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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT F. DEFORD, RAILWAY LABOR EXECUTIVES' ASSOCIATION and UNITED TRANSPORTATION UNION,
Petitioners,

v.

SOO LINE RAILROAD COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Does the complete pre-emption doctrine encompass federal statutes, such as the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, where Congress has not provided alternative federal causes of action for a litigant whose independent state law rights are asserted to be pre-empted by such statutes?

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Petitioners,

v.

SOO LINE RAILROAD COMPANY, *et al.*,
Respondents.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Robert F. Deford, the Railway Labor Executives' Association [hereinafter, "RLEA"], and the United Transportation Union [hereinafter, "UTU"] [2] respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered

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[1] Besides respondent Soo Line Railroad Coompany, the other respondents are: Wisconsin Central Ltd., Dennis Cavanaugh, Edward A. Burkhardt, Thomas F. Power, and Robert H. Wheeler.

[2] RLEA is a voluntary unincorporated association of the chief executive officers of seventeen standard national labor organizations which represents railroad employees in the United States. Petitioner UTU's president was a member of RLEA at the time this suit was filed, but, as of mid-April 1989, he is no longer a member of RLEA. Since the UTU is still participating in this action, it has been listed as a petitioner. Appendix F hereto at 59a is a list of RLEA's present member organizations.

on February 9, 1989 in *Deford v. Soo Line R.R., et al.*, 867 F.2d 1080 (8th Cir. 1989).

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 867 F.2d 1080 and is reprinted as Appendix A hereto at 1a-28a. The court's judgment was also entered on February 9, 1989; it is printed in Appendix C hereto at 35a-36a.

The August 20, 1987 ruling of the United States District Court for the District of Minnesota (Rosenbaum, J.) was issued orally from the bench; there was no written opinion. The relevant excerpts of the transcript of proceedings are printed as Appendix B hereto at 29a-34a. The District Court's judgment is printed in Appendix D hereto at 37a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its decision on February 9, 1989. Petitioner has not sought rehearing and is filing this petition within the time prescribed by 28 U.S.C. § 2101(c). Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The complaint underlying this action was brought under the Minnesota Uniform Fraudulent Transfer Act [hereinafter, "Fraudulent Transfer Act"], Minn. Stat. Ann. §§ 513.41-51, and was filed in Minnesota District Court, Hennepin County. The complaint was removed to the United States District Court for the District of Minnesota, Fourth Division, pursuant to 28 U.S.C. § 1441(a), purportedly under the Railway Labor Act [hereinafter, "RLA"], 45 U.S.C. § 151, *et seq.*, and the Interstate Commerce Act [hereinafter, "ICA"], 49 U.S.C. § 10101, *et seq.* Relevant portions of those stat-

utes are reprinted as Appendix E hereto at 39a-58a. Petitioners have also reproduced in Appendix E, Section 301(a) of the LMRA, 29 U.S.C. § 185(a), and Sections 502(a) and (f) of ERISA, 29 U.S.C. § 1132(a and (f).

STATEMENT OF THE CASE

The complaint in this case challenged the sale of certain assets of respondent Soo Line Railroad Company [hereinafter, "Soo"] as a fraudulent transfer, and was brought in a Minnesota court under that State's Fraudulent Transfer Act. The complaint was removed to the District Court on the ground that enforcement of the Fraudulent Transfer Act was pre-empted by two federal statutes, the RLA and the ICA. A divided panel of the Eighth Circuit held that the pre-emptive force of each of those statutes was so great that the Minnesota court lacked jurisdiction even to decide whether the state statute was indeed pre-empted. The divided panel then held that each federal statute pre-empted the operation of the state law.

The decision runs contrary to this Court's careful delineation in several cases of the narrow circumstances and "unique" statutes which fall within the "complete pre-emption doctrine" under which a purported state cause of action is in reality a federal cause of action and thus, subject to removal under 28 U.S.C. § 1441. The decision also conflicts with the decision of the United States Court of Appeals for the Third Circuit in *Railway Labor Executives' Association v. Pittsburgh & Lake Erie Railroad Co., et al.*, 858 F.2d 936 (3rd Cir. 1988), which held that neither federal statute has such complete pre-emptive force. Additionally, the panel's conclusion that the RLA and ICA pre-empted the State's Fraudulent Transfer Act, requiring the dismissal of the complaint, is contrary to prior decisions of this Court.

A. The Railroad Line Sale

Soo is a class one railroad and the nation's tenth largest rail system. Prior to the sale which gave rise to

this suit, respondent Soo operated a rail system of over 7,500 miles of track, including 1,960 miles of track in the states of Wisconsin, Minnesota, Illinois and upper Michigan known as the Lake States Transportation Division [hereinafter, "Lake States"].[3] Appendix A at 2a. On April 2, 1987, Soo agreed to sell Lake States to Wisconsin Central, Limited [hereinafter, "Wisconsin Central"], a railroad formed solely to purchase and operate Lake States. Wisconsin Central was not a rail carrier prior to its formation and purchase of Lake States. *Id.* at 2a-3a.

This sale was structured as a leveraged buy-out whereby Wisconsin Central contributed little equity in its investment and borrowed virtually the entire purchase price; Wisconsin Central's lenders took a first lien on all Lake States assets. *Id.* at 3a-4a. As collateral for the loan, Wisconsin Central pledged Lake States' assets that, up to that point, had been available to Soo's unsecured creditors. The particulars of the transaction are unknown to petitioners since Soo refused to disclose them in this proceeding and has published only fragmentary information concerning the sale.

The Interstate Commerce Commission [hereinafter, "ICC" or "Commission"], which has jurisdiction of transfers of railroad assets, has held that transactions such as the subject transaction are governed by 49 U.S.C. § 10901, which requires ICC approval before such

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[3] Respondent Soo's rail system in 1987 was a combination of the Soo as it existed in 1984 and over 3,000 miles of trackage which the carrier acquired on February 19, 1985, from the Chicago, Milwaukee, St. Paul & Pacific Railroad Company. *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 2460 (1987). The vast majority of the Lake States Division lines were Soo trackage prior to the Milwaukee acquisition.

transactions can be consummated. However, the ICC exercised its authority under 49 U.S.C. § 10505 and exempted the entire class of transactions like the Soo-Wisconsin Central transaction from prior regulation under the ICA. *Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines under 39 U.S.C. 10901* [hereinafter, "*Ex Parte 392*"] 1 I.C.C. 2d 810 (1986), *aff'd sub nom. Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table). *See* Appendix A at 16a. In accordance with the ICC's *Ex Parte 392* procedures, Wisconsin Central filed a notice of exemption on September 4, 1987.[4] The ICC stayed the effectiveness of the exemption through October 27, 1987 to investigate the transaction, but later lifted the stay while continuing to review the matter. *Id.* at 3a.

Petitioner Robert F. Deford is a union represented employee of the Soo, who alleged in the complaint that he has present and future matured and unmatured claims for accrued but unpaid wages, vacation pay, insurance, and severance pay. Deford brought his complaint on his own behalf, and on behalf of a class of similarly situated Soo employees, as creditors seeking to protect their claims under the Fraudulent Transfer Act. Petitioner RLEA sought to protect the claims of its constituent member organizations, and the employees they represent, as creditors of the Soo with respect to wages, welfare benefits, dues "check offs", and other matured and unmatured claims under various collective bargaining agreements. *Id.* at 4a-5a.

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[4] Under the ICC regulations which existed when Wisconsin Central filed its verified notice, the exemption was effective seven (7) days after the notice was filed. 49 C.F.R. § 1150.31(b) (1986). On February 29, 1988, the ICC modified its *Ex Parte 392* regulations to require that at least thirty-five (35) days' advance notice be given for sales such as the one in this case. 49 C.F.R. § 1150.35(a) and (e) (1989).

B. The Complaint

On June 12, 1987, Deford and RLEA brought this action in Minnesota state court against respondent Soo, Wisconsin Central and several individuals,[5] asserting fraudulent conveyance claims under Minnesota common law and the Minnesota Uniform Fraudulent Transfer Act, Minn. Stat. Ann. §§ 513.41-51. (*See* Appendix E hereto, at 55a-56a.)

The complaint alleged that the sale of Soo's Lake States division:

—constituted an attempt to hinder, delay, or defraud Soo's Lake States employees and RLEA of their rights as existing Soo creditors. Joint Appendix in 8th Cir. No. 87-5376 [hereinafter, "J.A."] (J.A. at 26);

—was not fair consideration and left Soo with unreasonably small capital for future operations (J.A. at 27); and

—constituted a conspiracy to frustrate their rights as creditors and tortious interference with their rights as creditors (J.A. at 33).

The complaint asserted that the purpose and effect of the Lake States sale was to circumvent, not breach, Soo's obligations to employee and union creditors. (J.A. at 33).

C. The District Court Decision

On July 1, 1987, the defendant railroads, claiming federal question jurisdiction, removed the action to the United States District Court for the District of Minnesota and moved to dismiss the complaint, asserting complete federal pre-emption by the RLA and ICA. On

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[5] At the time this suit was filed, respondent Dennis M. Cavanaugh was Chairman and Chief Executive Officer of the Soo; respondents Edward A. Burkhardt, Thomas Power, and Robert H. Wheeler were officers or directors of Wisconsin Central; respondent Richard B. Ogilvie has since died; and respondent "John Doe" includes unknown investors or lenders, among others. J.A. at 11.

July 10, 1987, plaintiffs moved under 28 U.S.C. § 1447 for a remand of the action to state court.

On August 20, 1987, United States District Judge James M. Rosenbaum denied petitioners' motion to remand and granted the railroads' motion to dismiss, ruling that the fraudulent conveyance claims "are determined by their [collective bargaining] contracts with the railroads, [and therefore] these claims are governed by the Railway Labor Act." (Appendix B at 32a). Finding that rights created by the collective bargaining agreements were "essential elements" of the fraudulent conveyance claims, Judge Rosenbaum concluded that the arbitration panels of the National Railroad Adjustment Board [hereinafter, "NRAB"], set up by the RLA to resolve so called "minor disputes" (disputes over the interpretation or application of collective bargaining agreements), are the exclusive fora for these claims:

> Where, as in this case, the dispute arises out of the employment relationship and, in the final analysis, involves an attempt to impose a right claimed to be incident to that relationship, the statutory forum is the NRAB.

Id. at 33a.

D. The Court of Appeals Decision

A divided panel of the Eighth Circuit, with Chief Judge Lay dissenting, agreed with the district court that the RLA completely pre-empts petitioners' fraudulent conveyance claims; the panel additionally held that the ICA also completely pre-empted these state law claims.

1. RLA Pre-emption

While acknowledging that a defense of federal law, including federal pre-emption, traditionally is not a basis for removal, the court of appeals said that this action involved "a significant exception to the general rule known as the 'complete pre-emption doctrine.'" Appendix

A at 7a. The court of appeals concluded that "the RLA 'pervasively occupies' the field of railroad labor disputes, completely pre-empting state law claims arising out of collective bargaining agreements." *Id.* at 8a. The court of appeals found that this fraudulent conveyance claim is a "minor dispute" within the exclusive jurisdiction of the NRAB because "the creditors' rights asserted are based upon the terms of the collective bargaining agreements . . . ." *Id.* at 13a.

The court acknowledged that the Third Circuit "has recently addressed this issue and reached the opposite result." *Id.* at 10a. However, the panel majority chose not to follow the Third Circuit's decision, concluding that the "history and purpose" of the RLA demonstrated that Congress intended it to be a complete pre-emption statute. *Id.* at 11a. The panel majority then ruled that the RLA pre-empted the complaint because "[t]he existence and extent of the creditors' rights asserted by Deford and by the RLEA . . . can be determined only by interpreting the collective bargaining agreements." *Id.* at 12a. The court did not, however, identify any question of interpretation of any collective bargaining agreement involved in these claims.[6]

2. *ICA Pre-emption*

The court of appeals also held that the ICA "so pervasively occupies the field of railroad governance that it completely pre-empts Deford's state law claims" and to support that conclusion, the court relied upon the

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[6] To support its conclusion that rail labor's complaint was actually one involving the interpretation of collective bargaining agreements, the Eighth Circuit looked to RLEA's suit against the Soo and Wisconsin Central which was pending in the United States District Court for the Northern District of Illinois (Civil Action No. 87 C 5293, *RLEA v. Soo*) in which RLEA sought to enforce the arbitration provisions of certain employee protective agreements and the RLA's prior notice, bargaining and status quo commands. *See*, Appendix A at 12a-13a.

"nature and purpose of the ICA" as well as the authority it confers on the ICC. *Id.* at 15a-16a. Noting that the ICC is authorized by the ICA to consider the financial aspects of a sale of a railroad line, and the impact of a sale on all employees, the court said that to "allow Deford to now bring a state law action would be to disregard the ICC's authority and expertise in this matter." *Id.* at 17a. In short, maintenance of Deford's state law fraudulent conveyance claim was held by the court of appeals to be inconsistent with the authority of the ICC. The Eighth Circuit said (*id.* at 18a):

> Consequently, the ICC provides a forum in which Deford may seek further relief and review complaints or requests for revocation of the class exemption and imposition of labor protective conditions that might be submitted by Deford or the RLEA.

The Court concluded that "this action is a collateral attack upon the ICC's decision to exempt the Lake States Division sale from regulation." *Id.* at 19a.

3. *The Dissent*

In his dissenting opinion, Chief Judge Lay disagreed with the majority's conclusion that the Fraudulent Transfer action involved a minor dispute pre-empted by the RLA because the claims were derived from obligations arising under collective bargaining agreements. Judge Lay cited this Court's decision in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. ——, 100 L. Ed.2d 410 (1988), which he said "recently addressed the error" of the majority's reasoning. Appendix A at 23a. He noted that in *Lingle*, a case involving Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, this Court had "held 'that an application of state law is pre-empted by § 301 *only if such application requires the interpretation of a collective-bargaining agreement.*'" *Id.*, *quoting Lingle*, *supra* at 420 (emphasis in original). Judge Lay observed that this Court had further held that:

> "[A] state law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby pre-empted."

Id. at 24a, *quoting Lingle*, *supra* at 423 n.12. He concluded that in the instant case, the RLA does not pre-empt Deford's complaint since (*id.*):

> Interpretation of the collective bargaining agreement is required only to determine standing as a creditor, and to determine the amount of damages. The state statute creates an entitlement independent of the collective bargaining agreement, and is not pre-empted by the RLA.

As to the ICA, Judge Lay concluded that that statute "is not as pervasive in scope as either section 301 of the LMRA or section 502(a) of ERISA," the only two statutes which this Court has found to be complete pre-emption statutes, and that the ICA therefore "does not completely pre-empt state law." *Id.* at 24a-25a. Furthermore, Judge Lay noted that the ICC had exempted Wisconsin Central's purchase of Lake States from regulation and thus "the ICC did not in fact reach the merits of the fraudulent conveyance claims." Appendix A at 27a. Judge Lay concluded that any pre-emptive force of either the RLA or the ICA "is not of the magnitude necessary to completely pre-empt state law so as to create removal jurisdiction." *Id.* at 28a.

REASONS FOR GRANTING THE WRIT

This case presents important issues concerning the century-old jurisdictional framework governing removal of federal question cases from state courts into federal courts. In particular, this case involves the extent to which a defendant in a state court proceeding may ask a federal court to assert jurisdiction over state law

causes of action where the defendant raises a federal regulatory statute as a *defense* to enforcement of the relevant state law. While this Court has recognized in certain, narrowly drawn circumstances, that Congress has so pervasively regulated a particular field of conduct that any cause of action dealing with that regulated field is necessarily one arising under federal law, the Eighth Circuit has expanded this "complete pre-emption" doctrine without any clear showing of a congressional intent to so pervasively occupy the field that state courts are deprived of jurisdiction to consider the underlying pre-emption issue. Indeed, in expanding this doctrine, the court of appeals relied upon two federal statutes which do not, on their faces, or in their legislative histories, purport to have such pervasive effects. Petitioners respectfully submit that this expansion of the complete pre-emption doctrine is contrary to applicable decisions of this Court, in particular *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987), and *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). Moreover, the Eighth Circuit's decision is in conflict with a decision by the Third Circuit in a case virtually identical to the one at bar—*RLEA v. Pittsburgh & Lake Erie R.R.*, 858 F.2d 936 (3rd Cir. 1988). As we explain below, this Court should grant the writ to eliminate this conflict on an important issue of federal-state relationships.

I. THE PANEL DECISION IS INCONSISTENT WITH THE LIMITED SCOPE OF THE COMPLETE PRE-EMPTION DOCTRINE AND WITH THIS COURT'S REASONING IN COMPLETE PRE-EMPTION CASES

Federal courts are courts of limited jurisdiction and, thus, unless Congress has given the United States District Courts jurisdiction to consider the subject matter of a suit, those courts do not have such jurisdiction. As relevant here, Congress has conferred original jurisdiction on the district courts to consider civil actions "arising under the Constitution, laws, or treaties of the

United States" (28 U.S.C. § 1331), and, in particular, original jurisdiction over any civil action "arising under any Act of Congress regulating commerce . . . ." 28 U.S.C. § 1337(a). Federal question jurisdiction, moreover may be invoked at the discretion of a defendant, if a suit is filed in a State court for under 28 U.S.C. § 1441(a) "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the . . . defendants, to the district court of the United States for the district . . . embracing the place where such action is pending." As this Court has emphasized before, however, "a cause of action arises under federal law *only* when the plaintiff's well-pleaded complaint raises issues of federal law." *Metropolitan Life Insurance Co. v. Taylor*, *supra*, 481 U.S. at 63 (emphasis added). This well-pleaded complaint "rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, *supra*, 482 U.S. at 392 (footnote omitted).

Frequently, defendants seek to involve the federal courts in state law suits by asserting that the state law claim is pre-empted by a federal law. However, since 1887, such a *defense* does not authorize removal to federal court, for as this Court has stated:

> [I]t is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

Caterpillar, 482 U.S. at 393. There is, nevertheless, one important caveat to this "principle," for a corollary to the "well-pleaded complaint rule" is that: "Congress may so completely pre-empt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life*, 481 U.S. at 63-64.

This exception—*i.e.*, the "complete pre-emption" doctrine—is rare, and will be found to exist only where it can be concluded that the "pre-emptive force of a statute is so 'extraordinary' that it 'converts' an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Caterpillar*, 482 U.S. at 393, *quoting Metropolitan Life*, 481 U.S. at 65. In the area of labor relations, complete pre-emption has been found to exist under only two statutory provisions—Section 301(a) of the LMRA, 29 U.S.C. § 185(a), and Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). *Metropolitan Life, supra*; *Avco Corp v. Aero Lodge No. 735, IAM*, 390 U.S. 557 (1968). In this case, though, the Eighth Circuit has expanded this select group of statutes, but has done so for reasons which ignore both the purposes underlying the complete pre-emption doctrine and the way in which Congress and this Court have carefully limited the ability of the federal courts to intrude into state law causes of action.

This Court has emphasized in *Metropolitan Life* that the "touchstone" of the complete pre-emption doctrine is the intent of Congress to make causes of action touching upon a particular area of regulation removable to the federal courts. 481 U.S. at 66. Whether or not a particular cause of action under state law is pre-empted by the federal regulation, even if such preemption is "obvious," is not determinative (*id.*); rather, the crucial inquiry is whether Congress *intended* to make its regulation "so powerful" as to displace any state cause of action governing the same conduct as regulated by Congress. *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 23 (1983). If such an intent is present, then the cause of action is "purely a creature of federal law" (*id.*), and, thus, one arising under federal law within the meaning of 28 U.S.C. § 1331.

In the two situations where this Court has found "complete pre-emption" in the labor relations area, there existed

clear manifestations of congressional intent. In *Avco Corp. v. Aero Lodge No. 735, IAM, supra*, 390 U.S. at 559-60, this Court reiterated its earlier conclusion in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), that Congress intended Section 301(a) of the LMRA to give the federal courts the power to fashion "federal law," based on federal labor policies, when enforcing collective bargaining agreements. Consequently, a suit to enforce a collective bargaining agreement, even though brought in a state court, is an action controlled by federal substantive law and, thus, removable to federal court. 390 U.S. at 560.

Similarly, in *Metropolitan Life*, this Court looked to congressional intent to determine if Section 502(a)(1)(B) of ERISA had a complete pre-emptive effect. After observing that in "the absence of explicit direction from Congress, th[e] question [of whether Section 502(a)(1)(B) had such an effect] would be a close one" (*Metropolitan Life*, 481 U.S. at 64), this Court examined ERISA's legislative history to ascertain that intent. *Id.* at 65-66. As this Court found, the civil enforcement provision of ERISA, Section 502(f), parallels § 301 of the LMRA by providing district courts with jurisdiction to adjudicate claims for benefits under ERISA. Additionally, the Conference Report on ERISA stated that all actions brought under § 502(a) "are to be regarded as arising under the laws of the United States in similar fashion to those brought under § 301" of the LMRA. H.R. Conf. Rep. No. 93-1280 at 327 (1974). That legislative history was determinative, for:

> No more specific reference to the *Avco* rule can be expected and the rest of the legislative history consistently sets out this clear intention to make § 502(a)(1)(B) suits brought by participants or beneficiaries federal questions for purposes of federal court jurisdiction in like manner as § 301 of the LMRA.

Metropolitan Life, 481 U.S. at 66. No such indication of congressional intent exists under either the RLA or ICA.

A. RLA Pre-Emption

This Court has long recognized that Section 3 of the RLA, 45 U.S.C. § 153, gives the adjustment boards created under that statutory provision "exclusive" jurisdiction to resolve disputes "growing out of grievances or out of the interpretation or application of" collective bargaining agreements between a railroad and its employees —*i.e.*, "minor disputes." *Slocum v. Delaware, Lackawanna & Western R.R.*, 339 U.S. 239 (1950); *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946). Since Congress has given the adjustment boards this jurisdiction, no court, neither a state nor a federal court, has jurisdiction "to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act." *Slocum*, 339 U.S. at 244.[7]

Centering upon this intent of Congress to keep "minor disputes" out of the courts, the Eighth Circuit concluded that "the RLA's preemptive force is so extraordinary that it takes over the whole field of railroad labor disputes arising from collective bargaining agreements." Appendix A at 10a. And to support that conclusion, the appellate court equated Section 3 of the RLA to Section 301 of the LMRA, adding that because Section 3 of the RLA "has essentially the same function as section 301 of the LMRA" (Appendix A at 10), this Court's decision in *Avco* "should also apply to the RLA." *Id.*

By equating Section 3 of the RLA to Section 301 of the LMRA, the Eighth Circuit ignored the crucial differences between the two statutory schemes. Section 3 of the RLA

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[7] Since no court has jurisdiction to resolve a dispute involving solely the interpretation of an RLA collective bargaining agreement, it follows that a suit to enforce such an agreement in state or federal court cannot be one "arising under" federal law.

gives the adjustment boards' exclusive jurisdiction to interpret railroad collective bargaining agreements, but, unlike Section 301 of the LMRA, it does not give federal courts jurisdiction to construe or to enforce such collective bargaining agreements; nor does it authorize those courts to develop a body of federal law implementing our national labor policies. *See, Textile Workers v. Lincoln Mills, supra,* 353 U.S. at 456-57. Consequently, Section 3 of the RLA lacks the pervasive nature of Section 301 which this Court concluded in *Avco* showed a congressional intent to make any suit to enforce an NLRA collective bargaining agreement a federal cause of action.

But even in Section 301 cases, a state law claim is not pre-empted, and thus, does not become a federal cause of action, where the state claim is "independent" of the collective bargaining agreement—*i.e.*, where "resolution of the state-law claim does not require construing the collective-bargaining agreement." *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. ——, 100 L. Ed.2d 410, 420 (1988). As Chief Judge Lay noted in his dissent in this case, petitioners' claims under the Minnesota Fraudulent Transfer Act do not require the state court to construe the collective bargaining agreements, but rather, require the interpretation of the State's statute. Appendix A at 24a. Under that state statute, which is the Uniform Fraudulent Transfer Act that has been enacted by many states, including Pennsylvania,[8] a plaintiff seeking relief under that Act need not establish the validity of a claim or have final judgment on a claim. *E.g., Baker v. Geist,* 457 Pa. 73, 321 A.2d 635 (1974); *Babcock v. Tam,* 156 F.2d 116 (9th Cir. 1946); *see also, Neubauca v. Clontier,* 265 Minn. 539, 122 N.W.2d 623 (1963); *BBCA, Inc. v. United States,* 630 F. Supp. 349 (D. Minn. 1986).

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[8] Pennsylvania Fraudulent Conveyance Act, 39 Pa. C.S.A. § 351, *et seq.*; this Act was the state statute involved in *RLEA v. Pittsburgh & Lake Erie R.R., supra.*

However, even if the validity of the employees' claims were disputed, and the resolution of that dispute was relevant to the ultimate application of the state statute, that fact would not oust the state court of jurisdiction over the Fraudulent Transfer claim. This is so, because as this Court noted in *Lingle* (100 L. Ed.2d at 423 n.12);

> [A]s a general proposition, a state law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby pre-empted. . . .

Thus, whether or not Section 3 of the RLA is a complete pre-emption statute required a much more thorough analysis than was employed by the Eighth Circuit. That analysis should have examined the fact that the adjustment boards have no power to construe or to enforce the rights which the State's Fraudulent Transfer Act gives *all* creditors, whether they are employees or mortgagors, since the complete pre-emption decisions of this Court are all consistent with this principle: federal statutes displace state-law claims *only* when the federal statute provides a federal cause of action to replace the state claim. Congress has provided no such substitute in the RLA to aid employees or other creditors in protecting the security for their claims.

B. ICA Pre-Emption

Although Congress has been regulating our nation's railroads through the ICA for over a century, no appellate court, until this case, has ever held that the ICA so completely pre-empts state laws as to make a state cause of action a federal cause of action. Indeed, while this Court has observed that the ICA "is among the most pervasive and comprehensive of federal regulatory schemes" (*Chicago & North Western Transportation Co. v. Kalo*

Brick & Tile Co., 450 U.S. 311, 318 (1981)), it has stopped far short of finding a complete pre-emptive effect. *Compare, Kalo Brick*, 450 U.S. at 331-32 (state cause of action precluded where ICC reached merits of claim, but Court "reserve[d] for another day the question whether such a cause of action lies when no application is made to the Commission"), *and, Hayfield Northern R.R. v. Chicago & North Western Transportation Co.*, 467 U.S. 622 (1984) (ICA does not pre-empt state eminent domain law which applied *after* carrier had exercised ICC authority and abandoned line). Moreover, even where Congress has expressly provided that an ICC order pre-empts state law, such as in 49 U.S.C. § 11341(a), this Court has concluded that the forum called upon to enforce that state law—*i.e.*, the state court—has jurisdiction to determine whether the state law is in fact pre-empted by the ICA. *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118, 122-23 (1948); *see also, ICC v. BLE*, 482 U.S. 270, 300 n.13 (1987) (Stevens, J., concurring).

In short, if the ICA was a complete pre-emption statute, that effect would have been recognized long-ago. The fact that it has not been so noted shows that the Eighth Circuit's analysis was flawed.

The incongruity of the Eighth Circuit's complete pre-emption rulings is highlighted by its conclusion that two distinct federal statutes, with decidedly different purposes, each completely pre-empts the same state law. No previous case has held that there can be such dual pre-emption by different statutes. In this Court's previous complete pre-emption cases, the parties whose state rights were pre-empted had a single, obvious alternative forum to air their grievance and a specific remedy authorized by federal law. Here, to the contrary, neither the NRAB nor the ICC is a forum dedicated or even charged to hear fraudulent conveyance claims or to protect the interests of railroad creditors.

II. THE DECISION OF THE DIVIDED EIGHTH CIRCUIT PANEL CONFLICTS WITH A THIRD CIRCUIT DECISION IN A VIRTUALLY IDENTICAL MATTER AND WITH THE DECISIONS OF OTHER COURTS

As the panel acknowledged in its divided decision below (App. A at 10a), its conclusion that the RLA is a complete pre-emption statute was contrary to the Third Circuit's analysis of a similar issue in *RLEA v. Pittsburgh & Lake Erie R.R.* [hereinafter, *"P&LE"*], 858 F.2d 936 (3rd Cir. 1988). Additionally, the panel's conclusion that the ICA is a complete pre-emption statute is also contrary to the Third Circuit's *P&LE* decision which concluded on identical facts that the ICA is *not* a complete pre-emption statute. Because as we explain below, the issues of whether the RLA and ICA completely pre-empt rail labor's ability to protect the creditor status and security of employee claims is an important and recurring issue in the rail industry today, this Court should resolve this direct conflict between the circuits.

P&LE, like this case, involved a state law fraudulent conveyance challenge to a railroad's sale of assets to a noncarrier pursuant to an exemption granted under 49 U.S.C. § 10505 from ICC regulation under 49 U.S.C. § 10901. Rail labor brought the *P&LE* case in state court, but the railroad defendants removed that action to federal district court and then moved to dismiss, alleging that the RLA and the ICA pre-empted the state fraudulent transfer claims. As in this case, RLEA sought a remand of the complaint to state court and opposed the motion to dismiss. RLEA was unsuccessful initially, for the district court agreed with the railroads, denied the motion to remand, and dismissed the complaint. That judgment was reversed by the Third Circuit which held that the district court was without subject matter jurisdiction and that the case must be remanded to the state court where the railroads could assert their pre-emption argument as a defense to the complaint. 858 F.2d at 944.

In *P&LE*, the Third Circuit relied heavily on this Court's analysis in *Metropolitan Life* and *Avco* to conclude that neither the ICA nor the RLA is a complete pre-emption statute (858 F.2d at 939-942), noting that this Court has relied upon the establishment of "civil enforcement provision[s]" in the LMRA and ERISA, as well as "clear indication[s] of Congressional intention[s] to permit removal despite the plaintiff's exclusive reliance on state law" in finding those statutes to be complete pre-emption statutes. 858 F.2d at 942. The Third Circuit also relied upon this Court's decision in *Caterpillar*, noting that this Court "emphasized that complete preemption is a distinct concept from ordinary preemption: "The fact that a defendant might ultimately prove that a plaintiff's claims are preempted under the NLRA does not establish that they are removable to federal court.'" 858 F.2d at 941, *quoting Caterpillar*, 482 U.S. at 398.

Based upon its review of this Court's precedent, the *P&LE* Court held that the RLA is not a complete pre-emption statute, stating "we find no evidence in the RLA or its legislative history of a congressional intent to permit recharacterization and removal of what purports to be a state claim." 858 F.2d at 939, 942.

The *P&LE* Court also held that the ICA is not a complete pre-emption statute giving rise to federal court removal jurisdiction. The court stated:

> The ICA, like the RLA contains no civil enforcement provisions creating a federal cause of action in favor of one in the position of RLEA or the employee creditors. Likewise, we find no affirmative evidence in the ICA or its legislative history that Congress intended state claims of this kind to be removable. Indeed, we have found no case or commentary even suggesting that there may be complete preemption under the ICA. For these reasons, we hold that the district court is without authority to recharacterize the state cause of action pleaded by RLEA as a federal cause of action arising under the ICA.

858 F.2d at 942. That decision, on both statutes, is in direct conflict with the Eighth Circuit's holdings and reasoning.

The divided panel's decision here regarding the pre-emptive effect of the RLA also conflicts with the Ninth Circuit's decision in *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1732 (1988). In *Price*, the defendant employer claimed that the plaintiff employee's state law wrongful discharge claims were completely pre-empted by the RLA. The *Price* court, using a complete pre-emption analysis similar to that argued by petitioners below, held that the RLA is not a complete pre-emption statute, and stated "Congress has not indicated, as it did with LMRA § 301 and ERISA, that the RLA is 'so powerful as to displace entirely any state cause of action.'" 829 F.2d at 876, *quoting*, *Franchise Tax Board v. Construction Laborers Vacation Trust*, *supra*, 463 U.S. at 23.[9]

In short, there is a square conflict among the circuits on these important issues of law.

III. EXPANSION OF THE COMPLETE PRE-EMPTION DOCTRINE, AND THE RELATED CONTRACTION OF SUBSTANTIVE STATE LAW, IS A MATTER OF NATIONAL IMPORTANCE AND CONCERN

This case arises because of the overly-leveraged nature of Soo's sale of Lake States to Wisconsin Central. The

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[9] The Eighth Circuit's decision on the pre-emptive effect of the RLA and ICA also conflicts with a decision of the United States District Court for the Northern District of Illinois in *Gendron v. Chicago & Northwestern Transportation Co.* (unreported decision rendered from bench by Shadur, J., April 7, 1988) (that decision is reproduced herein as Appendix G.) *Gendron* involves, as here and in *P&LE*, a challenge by a railroad creditor under the Illinois Fraudulent Conveyance Act to a railroad's ICC-exempted sale of a portion of its line to a noncarrier. The district court recognized the "importance of the issues" and stated that these "are obviously recurring matters." Relying on *Price*, 829 F.2d 871, the district court held that the RLA is not a complete pre-emption statute. The court also held that the ICA is not a complete pre-emption statute. Appendix G at 65a.

leveraged buy-out, and indeed the *overly* leveraged buy-out, are phenomena of our times. These transactions take assets that, up to the point of sale, were available to the seller's unsecured creditors to satisfy claims, and pledge them to the buyer's lenders. In other words, the subject assets are taken out of the reach of the unsecured creditors of the seller, sometimes improperly. *United States v. Gleneagles Inv. Co., Inc.*, 565 F. Supp. 556 (M.D. Pa. 1983). As long as businesses, especially businesses in financial trouble, continue to engage in overly-leveraged sales of assets, their unsecured creditors will turn to fraudulent conveyance actions to protect their rights. *See, United States v. Tabor Realty Corp.*, 803 F.2d 1288, 1287 (3rd Cir. 1986), *cert. denied sub nom. McClellan Realty Co. v. United States*, 107 S. Ct. 3229 (1987). This phenomenon is now spreading to the rail industry (*see*, ICC Docket *Ex Parte 480*, served May 2, 1989), and for Class I railroads which find themselves in financial trouble, these transactions seem attractive and probably will continue. As long as they do, creditors of the railroads will seek fraudulent conveyance relief and will be confronted with ICA pre-emption arguments, as well as RLA pre-emption arguments if they are covered by collective bargaining agreements.

But the most significant portent of the Eighth Circuit's decision goes beyond the RLA and ICA. If the Eighth Circuit is correct, a dramatic expansion of the complete pre-emption doctrine must occur. There are numerous other examples of federally regulated industries, especially those under licensing statutes, where regulated businesses will contend they are now free of state law constraints applicable to every other business. Many existing state laws may fall. *E.g., Baltimore & Ohio R.R. v. Oberly*, 837 F.2d 108 (3rd Cir. 1988) (state noise control statute not pre-empted by Federal Noise Control Act); *Cresenzi Bird Importers, Inc. v. New York*, 658 F. Supp. 1441 (S.D.N.Y. 1987) (license under federal

Endangered Species Act does not pre-empt regulation under New York Wild Bird Law.)

In this case, Soo employees have been left without a means to vindicate the state interest expressed in the Fraudulent Transfer Act, for neither the adjustment boards nor the ICC can consider or enforce those rights. But more important to this writ, the courts of the State of Minnesota have been deprived of their right to decide in the first instance whether the State's statute is pre-empted by the federal laws. Neither congress nor this Court has sanctioned such an expansion of federal jurisdiction, and due to the square conflict in the circuits on this important issue, this Court should determine whether the Eighth Circuit was correct in expanding the complete pre-emption doctrine.

CONCLUSION

For the reasons set forth above, the writ should be granted.

Respectfully submitted,

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Date: May 10, 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5376

ROBERT F. DEFORD, on behalf of himself and all employees of Soo Line Railroad Company affected by the disposition of Lake States Transportation Division and RAILWAY LABOR EXECUTIVES' ASSOCIATION, on behalf of itself and represented employees,

Appellants,

v.

SOO LINE RAILROAD COMPANY, a Minnesota Corporation, SOO LINE CORPORATION, a Minnesota corporation, DENNIS M. CAVANAUGH, Wisconsin Central Ltd., an Illinois corporation, EDWARD A. BURKHARDT, THOMAS POWER, ROBERT H. WHEELER, JOHN DOE and RICHARD B. OGLIVIE,

Appellees.

Appeal from the United States District Court
for the District of Minnesota

Submitted: May 12, 1988

Filed: February 9, 1989

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

This appeal is brought by Robert F. Deford, on behalf of himself and all other employees of the Soo Line Railroad Company adversely affected by the sale of a portion of Soo Line's rail lines, and by the Railway Labor Executives' Association (RLEA).[1] The district court[2] denied a motion to remand the case to state court and dismissed appellants' complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. The district court, in statements from the bench, determined that the case was a "minor dispute" under the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188 (1982), and that the RLA completely preempted Deford's state law claims of fraud, conspiracy, and tortious interference with creditor's rights, and required arbitration rather than court adjudication. We affirm the district court's judgment denying remand to state court and dismissing the complaint, and conclude that the district court properly analyzed the preemptive effects of the RLA. We further hold that under the circumstances of this case the Interstate Commerce Act (ICA), 49 U.S.C. §§ 10101-11917 (1982), is also an appropriate basis to preempt the state law claims.

I.

On April 2, 1987, Soo Line, a class I railroad with approximately 7,750 miles of rail lines in twelve states, agreed to sell a portion of its rail lines (1,960 miles) known as the Lake States Division to Wisconsin Central Ltd. Wisconsin Central, a recently formed Illinois corporation, was not a carrier prior to the transaction, but

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[1] RLEA is a voluntary, unincorporated association of the chief executive offices [*sic*] of the standard national and international railway unions in the United States. RLEA brings this action on behalf of its constituent members and their unions.

[2] The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota.

became a completely independent railroad upon the sale of the Lake States Division. The structure of the sale was a leveraged buyout, where Wisconsin Central, having little equity in the investment, financed a substantial portion of the purchase price. Wisconsin Central's lender then took first lien on all the assets of the Lake States Division.

Sales such as these are governed by the Interstate Commerce Act (ICA), which provides for Interstate Commerce Commission (ICC) regulation of railroad acquisitions. To comply with the ICA, Wisconsin Central was required to either obtain ICC approval of the sale or receive an exemption from the ICC approval procedures. Wisconsin Central filed a notice of exemption with the ICC on September 4, 1987. The ICC stayed the effectiveness of the notice of exemption through October 27, 1987 to investigate the acquisition and invited comments by interested parties. After evaluating comments by several labor organizations, including the RLEA, the ICC lifted the stay but continued to review the transaction. The sale became effective three days later. The RLEA then filed a petition to revoke the exemption, which the ICC denied on July 8, 1988.

Deford and RLEA brought this action in Minnesota state court on June 12, 1987, asserting claims under Minnesota common law and the Minnesota Uniform Fraudulent Transfer Act, Minn. Stat. Ann. §§ 513.41-51.[3] Deford first alleged that the sale of the Lake States

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[3] Deford and RLEA framed their complaint around Minn. Stat. §§ 513.20-513.32. This statute, however, was repealed but reinstated in 1987 with minor changes. Because the changes are not relevant here, we base our analysis on the new statute. The statute provides in part:

> 513.44 Transfers fraudulent as to present and future creditors
>
> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was

Division to Wisconsin Central was an attempt to defraud Soo Line employees and the RLEA of their rights and benefits as creditors, in the form of accrued but unpaid wages, vacation pay, labor protection pay, insurance premiums, and pension contributions. Deford further alleged that the transfer of proceeds from the sale was not for fair consideration, leaving Soo Line with an unreasonably small amount of capital for future operations. Further, Deford stated that the sale proceeds will be disbursed to shareholders and other creditors of Soo Line, not to Soo Line employees. Thus, the position of the plaintiffs as creditors of an undercapitalized post-sale entity would be severely impaired. Deford also alleged that the leveraged sale of Lake States Division is a fraudulent conveyance as to those Soo Line employees who will quit and join Wisconsin Central, because Wis-

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incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

* * *

513.45. Transfers fraudulent as to present creditors

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

* * *

consin Central's secured lenders will have superior claims to Lake States assets. Finally, Deford alleged common law claims of conspiracy to frustrate creditors' rights and tortious interference with creditors' rights, arguing that the purpose and effect of the transaction was to circumvent Soo Line's labor agreement obligations to its employees and union creditors.

Deford sought a declaration that the sale of the Lakes [*sic*] States Division, the distribution of proceeds from the sale, and the creation of any security interests on the assets of the Lake States Division constituted a fraudulent conveyance. Deford further sought an order that the proceeds from the sale not be disbursed or pledged until the rights of the plaintiffs are adequately provided for, and that a receiver be appointed so that the sale proceeds may be placed in trust for the benefit of Soo Line employees and creditors.

Thereafter, the suit was removed to the United States District Court of Minnesota on the grounds that federal law preempted the state claims. Upon Deford's motion to remand and Soo Line's motion to dismiss, the district court concluded:

> plaintiffs have asserted rights arising under certain collective bargaining agreements and their contractual arrangements with the Defendant. * * * [T]hese claims are governed by the Railway Labor Act. * * * The application of this statute and the necessity of its interpretation establish the existence of a federal question as an essential element of the plaintiff's cause of action providing the basis for removal.

Deford v. Soo Line R.R. Co., No. 4-87-582, (D. Minn. August 20, 1987). The district court further stated that Deford could not avoid removal by failing to plead necessary federal questions and that artful pleading by the plaintiffs would not conceal the true nature of the com-

plaint. Finally, the district court held that the case involved a "minor dispute" which must be arbitrated according to the procedures of the RLA, which provides that the exclusive forum for a union dispute is the National Railway Arbitration [*sic*] Board (NRAB). The district court concluded that since the state court lacked subject matter jurisdiction, the district court acquired none upon removal. The suit was therefore dismissed for lack of subject matter jurisdiction. Deford now appeals, alleging error in the removal of the case to federal court and the subsequent dismissal of the case.

II.

The nature of the claims asserted by Deford have in essence two purposes. The first is to protect the rights and benefits of employees and the second is to raise questions about the financial soundness of the conveyance of the rail line from Soo Line to Wisconsin Central. These purposes in turn involve consideration of the protections afforded the employees by the Railway Labor Act, and the regulatory structures involved in approval of the transfer under the Interstate Commerce Act.

The primary issue before us is whether removal of Deford's state fraudulent conveyance and common law claims to federal court was proper, giving the district court power to dismiss for lack of subject matter jurisdiction. To determine this, we must decide whether the Railway Labor Act, the Interstate Commerce Act, or both completely preempt the state law claims. Only if there is complete preemption is removal justified, and it follows that such preemption then dictates dismissal.

To remove a case to federal court under 28 U.S.C. 1441, the claim must "aris[e] under" federal law. Ordinarily, a "right created by federal law must be an essential element of plaintiff's cause of action," and the essence of the federal claim must appear on the face of the complaint. *Evans v. Missouri Pac. R.R. Co.*, 795 F.2d 57,

58 (8th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S. Ct. 1886 (1987). Thus, a defense of federal law, including the defense of federal preemption, is traditionally not a basis for removal. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 4 (1983).

The Supreme Court, however, has fashioned a significant exception to the general rule known as the "complete preemption doctrine." This rule states that when the preemptive force of a federal statute is "extraordinary," it "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Caterpillar, Inc. v. Williams*, —— U.S. ——, 107 S. Ct. 2425, 2430 (1987). This exception prohibits a plaintiff from defeating removal by failing to plead necessary federal questions in a complaint and allows a defense of federal preemption as a basis for removal.

The Supreme Court has specifically recognized the complete preemption doctrine in two distinct areas. In *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557 (1968), the Supreme Court held that section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, displaced any otherwise applicable state law, even though the suit was brought in a state court. *Avco* involved an employer who, relying on state law, brought suit in a state court to enjoin a union from violating a collective bargaining agreement by striking. The court stated that when a section 301 action is brought, "[s]tate law * * * will be absorbed as federal law and will not be an independent course of private rights." *Id.* at 560 (citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957)). Thus, the claim was one arising under the laws of the United States within the meaning of the removal statute. 28 U.S.C. § 1441(b).

The Supreme Court extended the complete preemption doctrine in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S.

58, 107 S. Ct. 1542 (1987), permitting removal based on claims arising under section 502(a) of the Employee Retirement Income Security Act (ERISA), which provides for exclusive federal resolution of employee benefit disputes involving a covered plan. The court stated that the remedies of the federal "scheme would be completely undermined if ERISA plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." 107 S. Ct. at 1547 (citing *Franchise Tax Board*, 463 U.S. at 25-26)).

Deford maintains that the complete preemption doctrine applies only to section 502(a) of ERISA and section 301 of LMRA and that the district court erred in finding that complete preemption applies to the RLA as well. We recognize the Supreme Court has expressed reluctance to find this extraordinary preemptive power. *Id.* We are satisfied, however, that the reason underlying *Caterpillar*, *Avco*, and *Metropolitan* do not limit the doctrine to only the two statutes recognized by the Supreme Court. We believe that the fundamental question is whether the RLA or the ICA so pervasively occupy the field of railroad governance that a competing state law claim necessarily invokes federal law.

III.

In analyzing the statutory scheme of the RLA, we conclude that it "pervasively occupies" the field of railroad labor disputes, completely preempting state law claims arising out of collective bargaining agreements. The Railway Labor Act was enacted by Congress to promote stability in labor-management relations in the railroad industry. *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978). To effectuate this purpose the RLA provides for mandatory administrative grievance procedures and remedies for "minor disputes" arising from the employment relationship between a railroad employee and

the carrier.[4] A minor dispute is one involving the interpretation or application of an existing collective bargaining agreement. The RLA grants to the NRAB *exclusive* power to resolve all minor "disputes between an employee or group of employees and a carrier * * * growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * *." 45 U.S.C. § 153(i). NRAB decisions in disputes arising out of collective bargaining agreements are subject to limited judicial review in the federal courts. Once the administrative remedy with the NRAB has been exhausted, the party may not relitigate the issue in an independent judicial proceeding. *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972).

In compliance with the RLA requirements, federal courts have routinely dismissed a wide variety of state law claims, holding that statutory grievance procedures under the RLA are the mandatory and exclusive federal remedy for resolving minor disputes. "In enacting this legislation * * * Congress considered it essential to keep these so-called 'minor disputes' within the National Railroad Adjustment Board and *out of the courts.*" *Union Pacific R. R. v. Sheehan*, 439 U.S. 89, 99 (1978) (emphasis added). *See also Andrews*, 406 U.S. at 325; *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 38 (1963); *Landfried v. Ter-*

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[4] "The terms 'major' and 'minor' are not contained in the RLA, but were articulated by the United States Supreme Court to differentiate two types of disputes described in the Act which have distinct avenues of relief." *Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 797 n.3 (1st Cir.), *cert. denied*, —— U.S. ——, 107 S. Ct. 111 (1986) (citing *Elgin Joliet & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945)). Major disputes relate to the "formation or modification of the collective bargaining agreement," and thus have no bearing whatsoever on this case. The issue here is whether the minor dispute provisions of the RLA apply to preempt plaintiffs' state law causes of action.

minal R. Assoc., 721 F.2d 254, 255 (8th Cir. 1983), *cert. denied*, 466 U.S. 928 (1984); *Gregory v. Burlington N. R.R. Co.*, 638 F. Supp. 538, 540-41 (D. Minn. 1986), *aff'd*, 822 F.2d 1092 (8th Cir. 1987).

There is overwhelming case law to support our decision that the RLA's preemptive force is so extraordinary that it takes over the whole field of railroad labor disputes arising from collective bargaining agreements. In *Andrews*, 406 U.S. at 321, the Supreme Court accepted the RLA as an appropriate jurisdictional basis for removing a case from state to federal court. Similarly, the Ninth Circuit in *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 192 (9th Cir. 1983), held that a state action against an employer for wrongful demotion was removable to federal court because the nature of plaintiff's complaint was actually a grievance or dispute under the RLA. *See also Beers v. Southern Pac. Transp. Co.*, 703 F.2d 425, 427 (9th Cir. 1983); *McKinney v. Int'l Ass'n of Machinists & Aerospace Workers*, 624 F.2d 745, 747 (6th Cir. 1980). The Seventh Circuit has even equated the RLA with the LMRA to find complete preemptive powers in the RLA. *See, e.g., Leu v. Norfolk & W. Ry. Co.*, 820 F.2d 825, 830 (7th Cir. 1987); *Graf v. Elgin, Joilet & E. Ry. Co.*, 790 F.2d 1341, 1346 (7th Cir. 1986). Because section 153 of the RLA has essentially the same function as section 301 of the LMRA, which also involves settling collective bargaining disputes, these courts concluded that the Supreme Court's section 301 analysis in *Avco*, recognizing complete preemption of state law claims, should also apply to the RLA.

The Third Circuit, however, has recently addressed this issue and reached the opposite result. *See Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R. Co.*, 858 F.2d 936 (3d Cir. 1988) (hereafter *P&LE*). In *P&LE* the RLEA asserted a fraudulent conveyance action against a railroad under a Pennsylvania statute similar to the Minnesota statute at issue here. The court held that the case was wrongfully removed to federal court

because the complete preemption doctrine does not apply to collective bargaining disputes arising under the RLA. The *P&LE* court emphasized that because there is no affirmative indication of a congressional intention on the face of the statute to permit removal, the RLA cannot completely preempt state claims. In finding no congressional intent, the court particularly stressed the absence of a civil enforcement provision within the RLA under which the plaintiff could assert his fraudulent conveyance action. Because the plaintiff's state claim could not be recharacterized as a comparable claim arising under the RLA, no removal was permitted.

We believe that while the approach of the *P&LE* court sheds some light on whether a federal statute "pervasively occupies" a field of law, it is unnecessarily narrow. Not only must we look to affirmative congressional intent and civil enforcement provisions, but we must also look to such factors as the history and purpose of the statute. Recent case law illustrating the federal nature of the statute and analogous statutes with complete preemptive powers are also informative. Having analyzed the RLA under this light, we conclude that it was Congress' intent that the RLA govern all railway labor disputes such as those in this case arising from collective bargaining agreements.

Having decided that the complete preemption doctrine applies to collective bargaining disputes under the RLA, we must now decide whether Deford's Minnesota statutory and common law claims require interpretation of the collective bargaining agreement. Deford maintains on appeal that the common law and fraudulent conveyance claims alleged in his complaint do not fall within the definition of a "minor dispute" requiring the interpretation of a colective bargaining agreement. To determine if a claim is a minor dispute the key inquiry is "whether evaluation of the * * * claim is inextricably intertwined with consideration of the terms of the labor contract.

If the state * * * law purports to define the meaning of the contract relationship, the law is preempted." *Leu*, 820 F.2d at 830 (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985)).

Deford attempts to avoid RLA preemption by asserting that this action is not brought under any labor contract or protective agreement. The existence and extent of the creditor's rights asserted by Deford and the RLEA, however, can be determined only by interpreting the collective bargaining agreements. Even on the face of the complaint Deford predicates his claims upon entitlements to accrued but unpaid wages, vacation pay, life and health insurance, pension contributions, and severance benefits arising "pursuant to continuing labor contracts and employee protection agreements." Similarly, RLEA alleges entitlements "pursuant to the various collective bargaining agreements." In fact, all of plaintiffs' allegations regarding "creditors' rights" and "creditor obligations" are based entirely upon supposed rights to unspecified and unquantified "wages, benefits and labor protection" pursuant to the labor agreements. Deford and RLEA further assert as a basis for relief that "[e]mployees who quit would waive their rights under the Labor Agreements." Indeed, a theme that runs throughout the complaint is the defendants' alleged "circumvention of the burden of the Labor Agreements for Lake States' employees" through the sale.

Moreover, RLEA has sued Soo Line and Wisconsin Central in a separate action in federal district court in Chicago specifically alleging that the transaction here affects the rates of pay, rules and working conditions under various collective bargaining agreements between Soo Line and the unions. In its complaint, the RLEA sought to require compliance with the RLA and to arbitrate under the labor conditions set forth in *New York Dock Ry.—Control—Brooklyn E.D. Terminal*, 360 I.C.D. [*sic*] 60 (1979), which are imposed by the ICC. *See* Com-

plaint, Counts III and IV and prayers for relief in *Railway Labor Exec. Ass'n v. Soo Line R.R. Co.*, Civ. No. 87 C 52293 (N.D. Ill. filed July 13, 1987). We may take judicial notice of the pleadings filed in this proceeding. Fed. R. Evid. 201. RLEA ignores these allegations here when it maintains that no terms of collective bargaining agreements are at issue.

Deford further tries to avoid removal by arguing that the Minnesota fraudulent transfers act "imposes duties and obligations on all creditors completely independent of any collective bargaining agreement." This statement, however, mischaracterizes the nature of the fraudulent conveyance statute. The Minnesota Uniform Fraudulent Transfer Act is not substantive in nature, but instead merely confers an alternate remedy for protecting pre-existing creditor rights. The creditor rights a party seeks to enforce must exist under independent law, such as contract law. *See Brill v. W. B. Foshay Co.*, 65 F.2d 420, 423 (8th Cir.), *cert. denied*, 290 U.S. 643 (1933) (interpreting the Minnesota Fraudulent Transfer Act). The purpose of the statute is to grant creditors additional enforcement possibilities when a debtor transfers his assets to a third party. In this case the creditors rights asserted are based upon the terms of the collective bargaining agreements and the Minnesota statute only provides an additional method for enforcing the terms of the agreements. We therefore affirm the district court's finding that Deford's claims directly involve the collective bargaining agreements and constitute "minor disputes" under the RLA.

Deford bases his argument against preemption on *Evans v. Missouri Pac. R.R. Co.*, 795 F.2d 57, 58 (8th Cir. 1986), where we held that the federal preemption defense in response to a state law claim is not a ground for removal. Deford's reliance on *Evans* is misplaced. At dispute in *Evans* was whether a complaint alleging slander and damages pursuant to the Federal Employer's

Liability Act was a "minor dispute" arising under the RLA. The *Evans* court found that the complaint presented no question which would require interpretation of a collective bargaining agreement for their resolution and was therefore not a minor dispute. *Id.* The holding of *Evans* in no way excludes the RLA from the complete preemption doctrine.

Deford finally relies on several other Supreme Court cases to support his argument against removal of his claims under the RLA. These cases, however, can be distinguished from the present facts. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 198 (1978), a suit seeking an injunction against a union's peaceful picketing on the ground that the picketing violated state trespass law was not preempted by the NLRA. The Supreme Court specifically determined, however, that the state trespass claim was completely unrelated to a collective bargaining agreement. In *Lingle v. Norge Div. of Magic Chef, Inc.*, —— U.S. ——, 108 S. Ct. 1877, 1878 (1988), the Court held that section 301 of the LMRA did not completely preempt a state retaliatory discharge claim. The Court stated that a retaliatory discharge claim is a substantive state claim, "which addresses purely factual questions pertaining to the conduct of the employee and the conduct and motivation of the employer." *Id.* at 1881. Neither of these elements require a court to interpret the terms of a collective bargaining agreement. Thus, preemption was not warranted. The creditors rights asserted by Deford, by contrast, directly involve the interpretation of collective bargaining agreements. Finally, in *Farmer v. United Brotherhood of Carpenters and Joiners of America*, 430 U.S. 290 (1977), the Supreme Court held that the NLRA did not preempt a state tort action for intentional infliction of emotional distress arising in connection with alleged employment discrimination. The Court, however determined that the claim was not preempted because it was based on abusive and outrageous action by

the defendant. *Id.* at 302. In this case there has been no pleading of conduct in the transaction that reaches the level of abusive or outrageous behavior found in *Farmer*. We therefore find Deford's arguments based on these Supreme Court cases unpersuasive.

In conclusion, Deford is essentially claiming that if the sale of rail lines from Soo Line to Wisconsin Central is not, in effect, unwound, the transaction will result in a breach of Soo Line's obligations under the existing collective bargaining agreements. Thus, by asserting state law claims, Deford seeks enforcement of the terms of the collective bargaining agreements. The fraudulent conveyance act serves only as an enforcement mechanism. We believe Deford is only trying to invoke a state law remedy in place of the mandatory and exclusive remedies of the Railway Labor Act, and we therefore affirm the district court's removal of the suit to federal court and its subsequent dismissal of the case.

IV.

Additionally, we believe that the Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (1982), so pervasively occupies the field of railroad governance that it completely preempts Deford's state law claims. As stated in the previous RLA analysis, we must focus on the nature and purpose of the ICA, illustrated by the language of the statute and recent case law, to determine if the complete preemption doctrine applies to the ICA. The ICA's primary purposes are to ensure fair shipping rates, safety, fair wages and working conditions, and efficiency in transportation, and to discourage monopolistic practices and labor strikes. *See* 49 U.S.C. §§ 10101, 10101a. To promote these goals, the ICA generally requires that before a railroad acquires or abandons a railway line, the rail carriers involved must obtain approval by the ICC, which may include the imposition of labor protective agreements on the railroad. 49 U.S.C. § 10901. Pur-

suant to section 10505, however, the ICC may exempt any transaction from regulation under section 10901 when it finds that regulation "is not necessary to carry out" national rail transportation policy, and is "not needed to protect shippers from the abuse of market power." 49 U.S.C. § 10505(a). In 1985, the ICC exempted the entire class of transactions involving acquisition by "new carriers from the detailed approval procedures under section 10901."[5] *See* 49 U.S.C. § 10505; *Ex Parte No. 392, (Sub No. 1), Class Exemption for the Acquisition and Operation of Rail Lines under 29 [sic] U.S.C. § 10901*, 1 I.C.2d [*sic*] 810 (1986), *review denied sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (*Ex Parte No. 392*). Obviously labor protective agreements cannot be imposed when the transaction is exempt. The class exemption becomes effective and the transaction is deemed approved seven days after the acquiring entity files a verified notice with the ICC, unless the ICC stays the transaction.

Here Wisconsin Central filed a notice of exemption which was stayed by the ICC. After evaluating comments by the RLEA and other interested parties, the ICC lifted the stay, but continued to review the transaction. After bringing this action in federal court, the RLEA filed a petition to revoke the exemption and impose labor protective conditions, which the ICC denied.

The broad grant of power given the ICC in governing railway transactions is illustrated on the face of the ICA. The exclusivity of the ICC's authority is expressly set out in section 10501(d) which states: "The jurisdiction of the Commission . . . over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules and practice of such carriers, is exclusive." In sections 1144, 1145, and 1166, Congress granted to the ICC the power to require ex-

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[5] A "new carrier" is a newly formed railroad not already subject to the ICA.

tensive informational reports from rail carriers, including detailed financial data. The ICC in turn promulgated detailed regulations directing railroads to submit comprehensive financial and other operating data. 49 C.F.R. Part 1201. In determining whether to approve a transaction, the ICC is directed to consider both the financial aspects of the sale of rail lines to the non-carrier and the impact of the sale upon all employees involved. *See* 49 U.S.C. §§ 10901(a), (e). Furthermore, the ICC has discretion to condition its approval of a section 10901 transaction on the imposition of labor protective agreements containing a "fair and equitable arrangement for the protection of the interests of railroad employees adversely affected by the transaction." 49 U.S.C. § 10901(e). Thus, the ICC has obtained extensive information concerning the sale of Lake States Division and is uniquely qualified to evaluate the claims that Deford and the RLEA have brought before it. To allow Deford to now bring a state law action would be to disregard the ICC's authority and expertise in this matter.

Our decision is supported by the Supreme Court in *Chicago N. W. Transp. Co. v. Kalo Brick & Title* [*sic*] *Co.*, 450 U.S. 311 (1981). In *Kalo Brick*, the Court considered the extent of preemption of state law under former section 1(18) of the ICA, the predecessor of section 10901, in the context of a railroad abandonment. The plaintiff in *Kalo Brick* sought to collect damages in connection with the resulting loss of railroad services. In finding that the ICA preempted the state law claims, the Court reasoned that when Congress has chosen to legislate pursuant to its constitutional powers, a court must find state law preempted by federal regulation when the state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 317 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The Court further stated that the ICA "is among the most pervasive and comprehensive of federal regulatory schemes" and that "compliance with

the intent of Congress cannot be avoided by mere artful pleading" of state law claims "to gain * * * the relief * * * denied by the Commission." *Id.* at 318, 324. Also, the Court emphasized the *exclusive* nature of the ICC's jurisdiction and stated that "[t]he breadth of the Commission's statutory discretion suggests a congressional intent to limit judicial interferences with the agency's work." *Id.* at 321. Thus, it would be contrary to both the letter and the spirit of *Kalo Brick* to allow Deford and the RLEA to avoid the ICC's approval of the transaction pursuant to *Ex Parte No. 392* by pleading a state law claim.

Deford relies on *Hayfield N. R.R. Co. v. Chicago & N. W. Transp. Co.*, 467 U.S. 622 (1984), which denies preemption by the ICA of state law claims. In this case, however, the railroad received ICC approval to abandon railway lines. Thereafter, another railroad initiated state condemnation proceedings. The Supreme Court held that the ICA did not preempt the state condemnation claims because the ICC relinquished jurisdiction upon granting abandonment, and the application of the state statute would not obstruct the accomplishment of the ICA. *Id.* at 634-35. Here, on the other hand, Deford and the RLEA seek to regulate, through state law, the same aspects of the same transaction that the ICC is evaluating. In addition, this matter does not involve an abandonment, which puts the subject property outside the scope of ICC regulation, but rather an acquisition of rail lines which brings the new carrier, Wisconsin Central, within the ambit of continued regulation under the ICA.[6] Consequently, the ICC provides a forum in which Deford may seek further relief, and reviews complaints or requests for revocation of the class exemption and imposition of labor protective conditions that might be submitted by Deford or the

[6] *Kalo Brick* is distinguished from *Hayfield* in that it involved a state law claim for damages arising from the ICC's approval of abandonment. In *Hayfield*, the suit concerned activities occurring *after* the ICC had approved the abandonment.

RLEA. The ICC stated in its order of October 8, 1987 authorizing the class exemption that it would continue to receive comments and to review the effects of the transaction. In its decision of July 8, 1988, the ICC analyzed the many comments it received, specifically addressing RLEA's petition to revoke the exemption, and upheld its decision to exempt the sale of Lake States Division.[7] The ICC stated, however, that although this was their final decision on the issue, it still had jurisdiction to scrutinize the transaction and subsequently to revoke the exemption and impose labor protective conditions if warranted. Finance Docket No. 31102, *Wisconsin Central, Ltd.—Exemption Acquisition and Operation—Certain Lines of Soo Line Railroad Company*, p. 12, served July 8, 1988.

Furthermore, the ICC has exclusive jurisdiction to approve the issuance of securities, including debt instruments, by a carrier. 49 U.S.C. § 11301(b)(1). Here RLEA seeks to block Wisconsin Central's plan to finance its acquisition of the lines with debt instruments. The ICC, however, has exclusive jurisdiction over such an issuance and any disputes arising from it. *Id.* Thus, unlike *Hayfield*, the ICC will continue to review all complaints and to approve the issuance of securities. A state law action would therefore obstruct ICC functions.

In essence, we believe that this action is a collateral attack upon the ICC's decision to exempt the Lakes [*sic*] States Division sale from regulation. All of the claims brought by Deford and the RLEA in this lawsuit have been previously presented to the ICC for its consideration. When Wisconsin Central, filed with the ICC a notice of exemption under *Ex Parte No. 392*, the ICC invited comments from any interested parties. The RLEA submitted extensive comments opposing approval of the transaction

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[7] The ICC's July 8, 1988 order limited further discovery and emphasized the restriction that would be placed upon it. It is also of interest that the order referred to the RLEA's purchase offer for Lake States Division.

which focused on the financial aspects of the transaction—the same issues it raises under the guise of state fraudulent conveyance law in this lawsuit. In addition to RLEA's comments, the ICC entertained comments from other parties in considering its response to Wisconsin Central's petition for exemption. In its decision of October 8, 1988 the ICC lifted the stay of the exemption and allowed Wisconsin Central to acquire the Soo Line properties, but stated that it would continue to exercise its exclusive primary jurisdiction.

After Wisconsin Central consummated the purchase and began operating, the RLEA submitted a petition to revoke the exemption. In the petition, RLEA contended that because of the precarious financial position of Wisconsin Central due to the leveraged buyout, the ICC should exercise its discretion to revoke the exemption and impose employee protective conditions. On July 8, 1988, the ICC issued an order addressing these allegations. After a detailed analysis, the ICC concluded that Wisconsin Central's financial position was stable and that it would not revoke the exemption nor impose the employee protective conditions. RLEA's present attack on this transaction is no more than an attempt to annul or set aside the ICC's decisions with respect to this rail transaction under the exemption procedures. We therefore find it impossible to grant the relief Deford and the RLEA seeks here without impinging on the ICC's order. We conclude that when such a collateral attack is brought in state court under the guise of state law, the ICA necessarily completely preempts the state law claims and the suit is removable to federal court.

The Supreme Court reached the same result in *Venner v. Michigan Central R.R.*, 271 U.S. 127 (1926). In *Venner*, the ICC, upon application by rail carriers, approved an agreement between three railroads to acquire locomotives and pay for them by issuing certificates. Plaintiff brought an action in state court to enjoin the issuance of

certificates, which was later removed to federal court on defendant's motion. The federal court dismissed the appeal as a collateral attack on the ICC's order, holding the appeal to be:

> essentially one to annul or set aside the order of the [ICC]. While the [complaint] does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant [companies] be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside.

Id. at 130. This language aptly fits the efforts of Deford in this action. *See also Railway Labor Exec. Ass'n v. Staten Island R.R.*, 792 F.2d 7, 12 (2d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987) (district court dismissed claim alleging a violation under RLA because it impinged on ICC order under class exemption proceedings).

In sum, we believe that the ICA demonstrates Congress' intent to delegate to the ICC the exclusive responsibility to evaluate all aspects, including financial viability, of rail line transfers. The ICA provides both a forum and a set of remedies that is exclusive and completely preempts competing state law claims.

V.

We have determined that both the RLA and the ICA preempt Deford's state law claims. In two recent cases, we held that when there is a conflict between the RLA and the ICA, the provisions of the ICA governing labor protection agreements supersede the mandatory bargaining requirements of the RLA. *Burlington N. R.R. Co. v. United Transp. Union*, 848 F.2d 856, 863 (8th Cir. 1988); *Railway Labor Executives' Ass'n v. Chicago & N. W. Transp. Co.*, 848 F.2d 102, 104 (8th Cir. 1988).[8]

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[8] The Supreme Court has recently granted certiorari in *Railway Labor Exec. Ass'n v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420

In this case, however, it is not necessary that we decide which of the two statutes governs to the exclusion of the other. We have found complete preemption from both and removal is justified if there is complete preemption from only one. Once the district court had jurisdiction, the complete preemption which conferred jurisdiction was sufficient to authorize dismissal on grounds of preemption. We affirm the judgment of the district court.

LAY, Chief Judge, dissenting.

I respectfully dissent. Neither the Railway Labor Act (RLA) nor the Interstate Commerce Act (ICA) justifies removal under the "complete preemption doctrine." The doctrine is a narrow one. It allows removal when the preemptive force of a statute is so "extraordinary" that it completely displaces an area of state law.

The Supreme Court has been careful to limit the situations in which removal is appropriate. The Court has applied the doctrine in cases involving section 301 of the LMRA, 29 U.S.C. § 185(a), and section 502(a) of ERISA, 29 U.S.C. § 1144. In *Metropolitan Life Ins. Co. v. Taylor*, —— U.S. ——, 107 S. Ct. 1542, 1548 (1987), the Court examined the intent of Congress to determine whether section 502(a) of ERISA permitted removal. Justice Brennan, joined by Justice Marshall, concurred in the unanimous opinion of the Court, but wrote separately to emphasize the narrowness of the complete preemption doctrine:

> [O]ur decision should not be interpreted as adopting a broad rule that *any* defense premised on congressional intent to preempt state law is sufficient to establish removal justification. The Court holds only that removal jurisdiction exists when, as here, "Con-

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(3d Cir. 1988), which involves issues of preemption between the ICA and RLA.

> gress has *clearly* manifested an intent to make causes of action . . . *removable to federal court.*" (emphasis added). In future cases involving other statutes, the prudent course for a federal court that does not find a *clear* congressional intent to create removal jurisdiction will be to remand the case to state court.

Id. at 1548 (Brennan, J., concurring) (citation omitted) (emphasis in original).

No interpretation of the collective bargaining agreement is required here; therefore the RLA does not preempt state law. I would further hold under the circumstances presented here the ICA does not contain such extraordinary preemptive force as to invoke the complete preemption doctrine.

The Railway Labor Act

The majority finds that the employees' state law claims exist only to the extent that the collective bargaining agreement with the railroad creates entitlement to payment. The majority also finds that the interpretation of the collective bargaining agreement must be submitted to arbitration as a minor dispute under the RLA. The majority thus concludes that removal was proper under the RLA and that there exists no jurisdiction over minor disputes. The Supreme Court recently addressed the error of these conclusions in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. ——, 108 S. Ct. 1877 (1988).

In *Lingle*, the Court held "that an application of state law is pre-empted by § 301 of the Labor Management Relations Act of 1947 *only if such application requires the interpretation of a collective-bargaining agreement.*" *Id.* at 1885 (footnote omitted) (my emphasis).

The Court then described when "interpretation" is required:

> A collective-bargaining agreement may, of course, contain information such as rate of pay and other

> economic benefits that might be helpful in determining the damages to which a worker prevailing in a state law suit is entitled. Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state law claim, not otherwise pre-empted, would stand. Thus, as a general proposition, a state law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby pre-empted.

Id. at 1885 n.12 (citation omitted). The Court recognized the state law claim even though plaintiff would have to rely upon federal law for the determination of a damage award. The Court did not find that the state law claims were preempted by section 301 of the NLRA, let alone the complete preemption necessary for removal jurisdiction.

Here, plaintiffs assert claims under Minnesota common law and the Minnesota Uniform Fraudulent Transfer Act, Minn. Stat. Ann. §§ 513.41-51. As in *Lingle*, plaintiffs base their claims on definitive state law.

The majority finds that the Minnesota statute is not substantive, but that it seeks to enforce pre-existing creditor's rights which "exist under independent law, such as contract law." *Supra* at 13. Interpretation of the collective bargaining agreement is required only to determine standing as a creditor, and to determine the amount of damages. The state statute creates an entitlement independent of the collective bargaining agreement, and is not preempted by the RLA.

Interstate Commerce Act

The Interstate Commerce Act is not as pervasive in scope as either section 301 of the LMRA or section 502(a)

of ERISA. Therefore, the ICA does not completely preempt state law.

The general jurisdictional section of the ICA is contained in 49 U.S.C. § 10501. This section grants the Interstate Commerce Commission (ICC) jurisdiction over the "transportation" of people and property, and over related services. 49 U.S.C. § 10102(26). However, these sections do not confer jurisdiction over the sale of existing rail lines. Other sections of the ICA contain more specific grants of jurisdiction.[1] However, none of these sections is as pervasive in scope as are the two recognized areas of complete preemption set forth in *Taylor* and *Lingle*. The very structure and specificity of these sections tend to deny that the whole field of transportation has been extraordinarily preempted so as to justify removal jurisdiction.

In *Hayfield N.R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984), the Supreme Court considered whether federal regulation of abandonment of rail lines was so pervasive as to preclude state action. *Id.* at 632-34. The Court stated:

> The first contention attempts to bring this case within the narrow ambit of decisions in which this Court has indicated that congressional legislation so occupied the field of a particular subject area that state regulation within that field would be improper no matter how well state law comported with the federal policies involved. This Court has repeatedly affirmed, however, that "federal regulation of a field of commerce should not be deemed preemptive of state

[1] For example, 49 U.S.C. §§ 10901 (authorizing construction and operation of railroad lines), 10902 (authorizing action to provide adequate, efficient and safe facilities), 10903 (authorizing abandonment and discontinuance of railroad lines and rail transportation), 11301 (authority of certain carriers to issue securities and assume obligations and liabilities) and 11501 (ICC authority over interstate transportation) are such provisions.

> regulatory power in the absence of persuasive reasons —either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

Id. at 632 (citations omitted). The Court considered four factors in finding no preemption. First, the Court found Congress had *not* "unmistakably ordained" that states may not exercise traditional power of eminent domain over railroad property. Second, nothing in the Act referred to federal preemption of disposition of abandoned lines. Third, there was no indication that the subject matter permitted "no other conclusion" than that it was governed by federal, not state regulation. Finally, state law traditionally "governs the condemnation of ordinary real property." *Id.* at 632. The Court also found that condemnation did not obstruct the objectives of section 10905. *Id.* at 634-36.

This case is analogous to *Hayfield.* In *Hayfield*, the Court focused on section 10905 instead of the general jurisdictional statute, section 10501. This supports the contention that not all railroad transactions are preempted by federal law. The jurisdictional section at issue in our case, section 10901 (jurisdiction for construction and operation and exemptions for certain sales under *Ex Parte No. 392*, 1 I.C.C. 2d 810 (Dec. 19, 1985)) is nearly identical to section 10905. Section 10901(c)(1) is identical to section 10905(c) except that it expresses what the ICC "may" do instead of what it "shall" do. The use of the word "may" tends to make section 10901 weaker than section 10905. Finally, conveyances of real property and restrictions on corporate transactions are generally matters of state concern. In *Hayfield*, not only did the Supreme Court fail to hold the field to be so completely preempted as to create removal jurisdiction, but it did not even find state law eminent domain preempted by the federal abandonment provisions.

The majority relies primarily on *Chicago & N.W. Transp Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). The Supreme Court held that the ICA "precludes a shipper from pressing a state-court action for damages against a regulated carrier when the [ICC], in approving the carrier's application for abandonment, reaches the merits of the matters the shipper seeks to raise in state court." *Id.* at 331-32. However, this case is distinguishable from the facts here because the ICC did not in fact reach the merits of the fraudulent conveyance claims. Although the ICC claims it has continuing jurisdiction to evaluate the exemption granted by it to permit the sale, the ICC is not required to examine the merits of plaintiffs' claims, and had not done so. *See* 49 U.S.C. § 10901, *Ex Parte No. 392*, 1 I.C.C. 2d 810 (Dec. 19, 1985).

In announcing its grant of class exemption permitting sale without compliance with the more rigorous requirements of section 10901, the ICC stated:

> Finally, it should be noted that the use of the exemption process for approval of a transaction of this scope has raised some concern. We continue to believe that the policy underlying the exemption procedure established in Ex Parte No. 392 (Sub-No. 1) for the sales of lines to non-railroads remains valid and on the whole has been extremely beneficial to the shipping public. Nevertheless, it is true that the larger transactions, however one might define them, present issues which are at least somewhat less appropriately dealt with by the exemption process. More interests are more greatly affected, and the efficacy and fairness of revoking the exemption in a later proceeding becomes more questionable. Those difficulties are clearly raised with this transaction.

Wisconsin Central Ltd., Finance Docket No. 31102, Slip. op. at 3 (ICC Oct. 7, 1987). This indicates that the ICC has not reached the merits of plaintiffs' claims and

that it still had some apprehension over its grant of a class exemption.

I would hold that any preemptive force of either the RLA or the ICA is not of the magnitude necessary to completely preempt state law so as to create removal jurisdiction. I would reverse the district court's decision and remand with orders that the case be remanded to state court.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil Case No. 4-87-582

ROBERT F. DEFORD, *et al.*,
Plaintiff,

-vs-

SOO LINE RAILROAD CO., *et al.*,
Defendant.

TRANSCRIPT OF MOTION PROCEEDINGS HAD
BEFORE THE HONORABLE JAMES M. ROSENBAUM
MINNEAPOLIS, MINNESOTA

August 20, 1987

APPEARANCES:

Timothy D. Kelly and John Clarke for Plaintiffs

Patrick J. McPartland for Defendant Soo Line and Cavanaugh

Thomas P. Kane and David Seykora for the remaining Defendants

Also Present: Richard J. Flynn and Terence M. Hynes

* * * *

[61] THE COURT: Plaintiff's motion to remand [62] this action is denied. Defendant's motion to dismiss is granted. The Plaintiff's assert the Federal Court is without removal jurisdiction and the Defendant's assert removal to be proper, and dismissal is then appropriate because the Federal Court lacks subject matter jurisdiction.

The civil claim in which the United States District Court has original jurisdiction is brought in State Court. It of course may be remove [*sic*] by the Defendant to the United States district Court, 28 United States Code, Session [*sic*] 1441.

This case was removed by Defendant from the Hennepin County Court to this Court. The propriety of that removal turns on whether this case falls within the original federal question jurisdiction of this Court and the Court concludes that it does.

A Defendant may remove a case to Federal Court if the Plaintiff's complaint establishes that the case arises under federal law. A right or immunity created by the Constitution of the United States must be an element and an essential one, of Plaintiff's cause of action. Cite Franchise Tax Board versus Construction Laborers Vacation Trust, 103 Supreme Court 2841 at 2847, 1983. The requirement that the Court's federal question jurisdiction appear on the face of the Plaintiff's [63] complaint has been characterized as the well-pleaded complaint rule.

In this case the Plaintiff's complaint alleges the Defendant's actions Constitution [*sic*] a violation of the Minnesota Fraudulent Conveyance Act, Minnesota Statute Session [*sic*] 513, as well as present Minnesota common law claims; conspiracy to frustrate creditor's rights and a tortious interference with creditor's rights. The Defendants respond that Plaintiff's cause of action is really one of Federal Law because the complaint presents questions which require interpretation of the Railway labor Act for

their resolution. Defendants assert the Railway Labor Act as well as the Interstate Commerce Act preempt Plaintiff's alleged state cause of action.

The argument has obviously much focused on the Interstate Commerce Act and it's preemptive aspect, that is because the parties appear to have tactitly agreed that this dispute goes to the validity of and the viability of the sale of a portion of the Soo Line to Wisconsin Central, Limited. That may well be the prime dispute but the Minnesota cause of action and that before this Court concerns rights arising under the present existing Labor Act and the Plaintiff's perception that it's rights are in jeopardy. This focus [64] lends the Court to conclude that the Railway Labor Act provides a proper analytic mode.

Under the well-pleaded complaint rule the Plaintiff is generally considered master of his own complaint and is free to dictate the forum in which to bring his action. This principle is not, however, without limitation. And I would cite AVCO Corporation versus Aero Lodge 735, 390 U.S. 557, and 88 Supreme Court 1235, 1968.

Plaintiff may not defeat removal by omitting to plead necessary federal questions, citing Franchise Tax Board at 2853. Artful pleading by the Plaintiff will not be allowed to conceal the true nature of the complaint.

An independent corrollary of the well-pleaded complaint rule is the complete preemption doctrine. Caterpillar versus Cecil Williams, blank U.S. 55 U.S. Law Week 4804 and nine—I'm sorry, and 4805, June 9, 1987.

On occasion the United States Supreme Court has concluded that the preemptive force of a statute is so extraordinary that it converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule, that cite Caterpillar 55 U.S. Law Week at 4805 and Metro [65] Life versus Taylor, 107 Supreme Court 1542, 1987.

Once an area of state law has been completely preempted any claim purportedly based on that preempted state law is considered from it's inception a federal claim, therefore arising under federal law. Citing Caterpillar at 4806 and Franchise Tax Board at 2854.

In this case Plaintiffs have asserted rights arising under certain collective bargaining agreements and their contractual arrangements with the Defendant. They assert at this time that these rights make them creditors but the claims and the rights which they claim have accrued to them are determined by their contracts with the railroad, these claims are governed by the Railway Labor Act. The application of this statute, and I should cite the Railway Labor Act is 45 U.S.C. 151 et. sec. [*sic*] The application of this statute and the necessity of its interpretation establish the existence of a federal question as an essential element of the Plaintiff's cause of action providing the basis for removal.

The term by the Plaintiff that their rights make them somehow creditors as a right and they are then creditors under the Minnesota Statutes, represents an interesting academic exercise but it takes [66] but an instant, and the Court immediately determines that those rights are completely defined by the Railway Labor Acts coverage of the contracts in question.

The basic injury asserted in this case arises from the employment relationship between the Plaintiffs and the Defendant railroad. The existence and extent of any rights Plaintiffs may have are dependant upon the interpretation then of their Railway Labor Agreement. The interpretation of a contract of employment with a railroad is exclusively under the RLEA [*sic*] and involves a minor dispute according to that statute.

The Railway Labor Act requires matters involving minor disputes to be brought to the railway—sorry, to

the National Railway Adjustment Board, the NRAB, and handled according to it's grievance procedures, citing Elgin, S&E [*sic*] versus Burley, 325 U.S. 711 at 722 and 3, 1945. That Act and the Railway Labor Acts preemption diverts both the state and the federal Courts of subject matter jurisdiction over minor disputes. Andrews versus Louisville and Nashville, 92 Supreme Court 1562, 1972.

The NRAB has exclusive jurisdiction over disputes involving collective bargaining agreements between carriers and their employees. Choate versus Louisville, 715 F 2d 369 at 372, Seventh Circuit.

[67] Where, as in this case, the dispute arises out of the employment relationship and, in the final analysis, involves an attempt to impose a right claimed to be incident to that relationship, the statutory forum is the NRAB. Railway Labor Executives versus Atchison Topeka, 430 F2d 994 at 997, Ninth Circuit, 1970.

Plaintiffs cannot escape the exclusive governance of the RLA by articulating their claims in terms of a State Court action. See Leu versus Norfolk and Western Railway, number 86-1377, slip opinion, Seventh Circuit, 1987. Courts have viewed such attempts as end runs around the RLA's policy of channeling employment disputes toward arbitration, Lancaster and Norfolk [*sic*] 773 F2d 807, 815, Seventh Circuit, 1985, cert. denied at 107 Supreme Court 1607, 1987.

Plaintiffs here seek through their artful pleading to make that and by their efforts to style their claim as one arising under the Minnesota Fraudulent Conveyance Act to make an end run around the scope of the RLA.

Because this case involves a dispute which must be arbitrated following the procedures of the RLA, Minnesota state law is preempted from providing a basis for this claim and from relief. Cite Schroeder versus TWA 702 F2d at 189, 192, Ninth Circit [*sic*], 1983.

[68] Quoting, "If the state Court lacks jurisdiction of the subject matter the Federal Court acquires none, although it might be in a like suit, originally brought there —it might, I'm sorry, in a like suit originally brought there, have had jurisdiction. Labert Run Coal Company versus Baltimore and Ohio, 42 Supreme Court 349, 351, 19—1922.

The Minnesota Supreme Court—sorry, the Minnesota courts were without jurisdiction over the action between the Plaintiffs and the Defendants, subsequently the United States District Court acquired none, there being none to pass once the District Court action from Minnesota was removed.

This action is dismissed under Federal Rules of Civil Procedure 12(b)(1), this Court lacking jurisdiction. Be in recess.

(Recess)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5376

ROBERT F. DEFORD, on behalf of himself and all employees of Soo Line Railroad Company affected by the disposition of Lake States Transportation Division and RAILWAY LABOR EXECUTIVES' ASSOCIATION, on behalf of itself and represented employees,

Appellants,

v.

SOO LINE RAILROAD COMPANY, a Minnesota corporation, SOO LINE CORPORATION, a Minnesota corporation, DENNIS M. CAVANAUGH, Wisconsin Central Ltd., an Illinois corporation, EDWARD A. BURKHARDT, THOMAS POWER, ROBERT H. WHEELER, JOHN DOE and RICHARD B. OGLIVIE,

Appellees.

Appeal from the United States District Court
for the District of Minnesota

[Filed Feb. 9, 1989]

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the district court's judgment denying remand to the state court and dismissing the complaint is affirmed. The Court concludes that the district court properly analyzed the preemptive effects of the RLA. It is further adjudged and decreed that under the circumstances of this case the Interstate Commerce Act (ICA), 49 U.S.C. §§ 10101-11917 (1982), is an appropriate basis to preempt the state law claims.

February 9, 1989

Order entered in accordance with opinion.

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-87-582

ROBERT F. DEFORD, *et al.*

v.

SOO LINE RAILROAD COMPANY, *et al.*

ORDER

This matter is before the Court on plaintiffs' motion to remand this action to state court and defendants' motion to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. A hearing was held on August 20, 1987. Based on the files, records, and proceedings herein, and for the reasons set forth at the hearing, IT IS ORDERED that:

1. The motion of plaintiffs Deford and Railway Labor Executive Association to remand this action to state court is denied.

2. The motion of defendants Soo Line Railroad Company and Wisconsin Central Limited to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure is granted.

Dated: August 21, 1987

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

Filed Aug. 21, 1987

APPENDIX E

STATUTES RELIED UPON

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First, 45 U.S.C. § 152 First

B. Section 3, 45 U.S.C. § 153

II. Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* (Excerpts)

A. Section 10505, 49 U.S.C. § 10505

B. Section 10901, 49 U.S.C. § 10901

III. 28 U.S.C. § 1441(a)

IV. Minnesota Uniform Fraudulent Transfer Act, Minn. Stat. Ann. § 513.41, *et seq.* (Excerpts)

A. Section 513.44

B. Section 513.45

V. Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* (Excerpts)

A. Section 502(a) and (f), 29 U.S.C. § 1132(a) and (f)

VI. Labor Management Relations Act, 29 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 301(a), 29 U.S.C. § 185(a)

Statutes Relied Upon

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First

45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 3

45 U.S.C. § 153

First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its boards of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under

which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filed by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fails to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacany occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers, that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with section 2 hereof and which represent employees in engine, train, yard, or hostling service; Provided, however, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: Provided further, however, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respec-

tively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute.

In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs

in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in the United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the

findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in section 1291 and 1254 of title 28, United States Code.

(r) All actions at law based upon the provisions of this action shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately fol-

lowing the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: Provided, however, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and offcers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be

designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph *(l)* hereof, with respect to a division of the Adjustment Board.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional board of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional boards of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agree-

ment establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and by one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall elect an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or

group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day, named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

II. Interstate Commerce Act, 49 U.S.C. § 10101 et seq. (Excerpts)

A. Section 10505

49 U.S.C. § 10505

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or services is of limited scope, or (B) the application of a provision of this sub-

title is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continued intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

B. Section 10901

49 U.S.C. § 10901

§ 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or will be enhanced by the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall—

(1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

(2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

(3) have a copy of the summary published in the Federal Register;

(4) take other reasonable and effective steps to publicize the application; and

(5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application.

(c) (1) If the Commission—

(A) Finds public convenience and necessity, it may—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions the Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the construction or acquisition (or both) and operation approved by the Commission.

(d) (1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line, (B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

III. 28 U.S.C. § 1441(a)

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

IV. Minnesota Uniform Fraudulent Transfer Act, Minn. Stat. Ann. § 513.41, *et seq.* (Excerpts)

A. 513.44. Transfers fraudulent as to present and future creditors

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they came due.

B. 513.45. Transfers fraudulent as to present creditors

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

V. Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* (Excerpts)

A. Section 502(a) and (f), 29 U.S.C. § 1132(a) and (f)

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms

of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates ay provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

* * * *

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

VI. Labor Management Relations Act, 29 U.S.C. § 141, *et seq.* (Excerpts)

A. Section 301(a), 29 U.S.C. § 185(a)

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

APPENDIX F

Railway Labor Executives' Association
Member Organizations

American Railway & Airway Supervisors' Association (Division of TCU);

American Train Dispatchers' Association;

Brotherhood of Locomotive Engineers;

Brotherhood of Maintenance of Way Employes;

Brotherhood of Railroad Signalmen;

Brotherhood Railway Carmen (Division of TCU);

Hotel Employees and Restaurant Employees International Union;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Boilermakers and Blacksmiths;

International Brotherhood of Electrical Workers;

International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

Seafarers' International Union of North America;

Sheet Metal Workers' International Association;

Transport Workers Union of America;

Transportation • Communications Union (TCU).

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 88 C 918

T. J. GENDRON, *et al.*,
Plaintiffs,

vs.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, *et al.*,
Defendants.

Chicago, Illinois
April 7, 1988
9:15 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MILTON I. SHADUR,
Judge

APPEARANCES:

For the Plaintiffs:

MR. JOEL F. HANDLER

For the Defendant
Chicago and North Western:

MR. STUART F. GASSNER

For the Defendant
Fox River Valley Railroad Corp.

MS. EILEEN A. KAMERICK

* * * *

[2] THE COURT: Right. Let me just say at the beginning, that I am granting leave to both parties to cite additional authority and to take all the filings, although when I get these I sometimes wonder whether we wouldn't be wiser to have a rule like that in the Supreme Court or the Court of Appeals that says that on subsequent filings all you do is cite and not argue what the significance is. After all, I'm supposed to read them—and I do. But in any event, leave is granted for all the filings up to this point.

To my regret, the press of other matters has precluded my issuing a written opinion on the current motions here. It may be that I will be able to find some time and the opportunity later to do that, confirming the principles and the analysis, as well as the result, that I am about to tell you. [3] Indeed I would prefer to do that, both because of the interest and the importance of the issues. These are obviously recurring matters, because this is not the only effort that has been made here to assert this kind of action, and I assume that it's not going to be the last. But for the present my oral opinion and ruling are going to have to suffice for you.

The plaintiffs have quite deliberately shaped their Complaint with care to assert only a state-based cause of action. It should of course be emphasized, as a necessary consequence of that, that kind of shaping may lessen a plaintiff's ability to prevail—that is, to be successful on the merits of the claim. It seems to me that's sort of pro tanto circumscribed by the way in which the Complaint is framed.

But in any event the defendants' effort to remove the action is under what has become known as the "artful pleader" doctrine. Both sides recognize that. That doc-

trine is essentially, I guess, a modern version of the principle that's become asssociated, at least in my mind, with the great Illinois lawyer of the past, Abraham Lincoln. I am sure all of you know, or should know, the Lincoln story in which he asked: "If you call a dog's tail a leg, how many legs does the dog have?" And when the answer was "Five," he said, "No, it's four, because calling a dog's tail a leg doesn't make it so."

In the kind of simplistic era of The Fair against [4] Koehler, it was literally true that every plaintiff was the master of his, her or its claim. Now of course some exceptions have been recognized to that concept where a federal claim is necessarily implicit in the plaintiff's action. But it appears to me that the defendants somewhat overstate those exceptions, which have been extraordinarily limited by the Supreme Court. Both in Caterpillar against Williams at 107 Supreme Court 2425, and before that in the same term in Metropolitan Life Insurance against Taylor, 107 Supreme Court at 1542, it was decided last year that federal pre-emption is a defense that doesn't confer federal jurisdiction unless that preemptive force is what they call "so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." Because Caterpillar is one of the increasingly rare unanimous Supreme Court decisions, because it states the operative principles so succinctly, and because, of course, I couldn't hope to improve on Justice Brennan, I am going to read the portion of the framework that I find controls here. This is at 107 Supreme Court 2429 to 2430.

> "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. . . . The rule makes [5] the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law . . .

". . . it is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue. . . .

"There does exist, however, an 'independent corollary' to the well-pleaded complaint rule . . . known as the 'complete pre-emption' doctrine. On occasion, the Court has concluded that [sic] pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule' . . . . Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law . . . ('[I]f a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law')."

What is at work here, as I believe Caterpillar and Metropolitan Life evidence, and indeed the prior case law that they crystallize and apply, is a kind of pre-emption "Animal [6] Farm": Some pre-emptions are more equal than others. What may be called "ordinary pre-emptions" or maybe even "ordinarily extraordinary pre-emptions" are only defenses that will not support the removal of a complaint that's consciously stated in state law. It should be emphasized, of course, that the success or failure of a pre-emption defense is not the determinant. If that were true, pre-emption would create kind of self-fulfilling prophecy. Courts would be compelled to look at the merits of pre-emption in order to determine jurisdiction, which is sort of a contradiction in terms.

Although I'm certainly loath to attempt to redefine concepts that the Supreme Court appears to be picking out by a line of decisions, to paraphrase Justice Frankfurter's once famous metaphor, what the courts look at is a kind

of "field pre-emption"—that is, a kind of "extraordinarily extraordinary pre-emptive force." All of this is really not (although it may sound like it) a kind of play on words. Let me remind counsel that in the very field in which the "artful pleading doctrine" has been most forcibly advocated and applied by the Supreme Court, Section 301 of the Labor Management Relations Act, the Court has required materially more than an employee cause of action against an employer in commerce. Allis-Chalmers against Lueck and now Caterpillar have announced that subsantially more is required. And although I know the risks of predicting what the Supreme Court is going to do, it [7] strikes me that there is at least a substantial chance that they are going to consider Lingle against Magic Chef, which was argued just last month and is going to be decided this term, as beyond the pale in contrast to what our own Court of Appeals has done.

Let me just say parenthetically that Oneida Indian Nation, 414 US 661 at 675 is somewhat different. What it says is that any claim to possession of Indian lands is by definition a federal law claim, and therefore the only source of those rights is federal law. That's really a different kind of animal from the one that we are looking at either in the Labor Management Relations Act or in ERISA.

Now although the artful pleader doctrine is at least 20 years old (I think AVCO came down in 1968), the Court has really found only one statute besides certain applications of the Labor Management Relations Act to qualify for that kind of treatment. That's the ERISA claims, which draw from the same kind of principle. Again I except Oneida, because that's kind of a sport in those terms. Once again, even in the ERISA situation it was certain kinds of claims by certain classes of claimants that give rise to this "extraordiary pre-emptive force."

What then I find defendants argue here, although they certainly advance persuasive arguments for "claim pre-

emption," would really obliterate the line sought to be drawn by [8] Caterpillar and Metropolitan Life and the statutes that they rely on or exemplify. Let's take a look at the two things that the defendants rely on here.

First as to the Railway Labor Act, as you know, Price against PSA, a Ninth Circuit decision of last year, 829 F.2d 871, rejects that statute as falling in that kind of "extraordinary pre-emption" category. And I find that opinion quite persuasive, although in our own circuit the Graf decision contains some perhaps inconsistent musings by Judge Posner, really dicta once removed. But more important than that, it would distort the plaintiffs' claim to put it under that rubric anyway. Both Allis-Chalmers against Lueck and Caterpillar analysis show that the sort of claim that is asserted would not apply the Railway Labor Act. All that has to be done is to read those opinions—and indeed, just read the recent argument as reported in Law Week in Lingle against Norge Magic Chef.

As for the Interstate Commerce Act, there is no question that Kalo Brick, 450 United States 311, articulates and applies a notion of pre-emption over certain kinds of claims—things that can't be advanced under state law without somehow subverting the express grant of federal jurisdiction. In that case the state law abandonment remedies were totally at war with the Interstate Commerce Commission's jurisdiction over abandonment of rail lines. Those two things really could not [9] coexist.

Here it might certainly be urged that at least part of the relief that plaintiffs seek bears the same relationship to the ICC's exemption of the transaction, although even that is cast in some doubt by this just-decided Delaware and Hudson case that both parties have addressed. Indeed I might say that both sides overstate their positions on Delaware and Hudson somewhat. It doesn't control the issue, as the plaintiffs would appear to contend, that identical relief isn't available from the ICC that a court might provide if the plaintiffs were successful. Familiar

pre-emption law teaches that a congressional decision to pre-empt a field may take the form of deciding that relief won't be granted, as well as deciding that relief will be granted. So it doesn't mean that all the remedies have to track, have to be parallel, in the two situations. On the other hand defendants' contention is a little too broad, because the fact that certain remedies are unavailable in the administrative forum may bear on the question whether Congress intended to occupy the entire field to the exclusion of judicial remedies. Plaintiffs have some force in the argument that Delaware and Hudson evidences the ICC's own perception that not all aspects of a rail takeover and its fallout effects are within the ken of the ICC. And that is, I suppose, a clue to how the ICC perceives congressional intent. In a sense that's somewhat a side-issue, [10] because even if that issue were overcome in material part, what the plaintiffs seek has to do not with the approval of the transaction as such—as a sale that satisfies the public convenience and necessity—but rather with the consequences of the transaction and with its effect on creditors. That is something that it does not clearly appear enters into the ICC's formulation and determination. Accordingly, I determine that it has not been shown that the Interstate Commerce Act has been put into this kind of exclusive fraternity of the LMRA Section 301 and ERISA for present purposes.

In summary, then, I find that the plaintiffs have indeed invoked a purely state-law claim. So this case was, in the statutory language of Section 1447(c), removed improvidently and without jurisdiction. Let me again underscore that I suggest nothing as to whether the state court on remand may find the pre-emption defense successful, and I certainly express to [sic] opinion on the viability of the claim. But the threshold question of jurisdiction is the one that I'm required to look at. And I therefore find that the case should be remanded.

Only one issue then remains, and that is as to the time of remand. Our local rule provides that there is a 14-day delay on remand unless the Court orders remand forthwith—that is, orders the certificate to go forward forthwith. Because this is not a discretionary situation (the kind of [11] thing that was dealt with by the Ninth Circuit in that Price against PSA case), it seems to me that no purpose is to be served by delaying the opportunity of both sides to pose the pre-emption defense to the state court. And therefore I'm ordering that the remand certificate go out forthwith.

* * * *

Supreme Court, U.S.
FILED
JUN 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1824

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT F. DEFORD, RAILWAY LABOR EXECUTIVES' ASSOCIATION AND UNITED TRANSPORTATION UNION,

Petitioners,

v.

SOO LINE RAILROAD COMPANY, et al.,

Respondents.

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

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Date: June 16, 1989

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82 P/D

QUESTION PRESENTED

Does Section 3 First of the Railway Labor Act, 45 U.S.C. § 153 (1982), or the Interstate Commerce Act's regulation of rail asset acquisitions and the regulations promulgated thereunder, 49 U.S.C. §§ 10505, 10901 (1982); 49 C.F.R. §§ 1150.31-1150.34 (1986), completely preempt an action brought in state court seeking to rescind a sale of rail assets through the procedural mechanism of state fraudulent conveyance law where the Interstate Commerce Commission has fully examined and approved the sale and where the action seeks to assert claims arising out of and requiring construction of railway labor agreements presenting a minor dispute subject to the exclusive jurisdiction of the National Railroad Adjustment Board?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1824

ROBERT F. DEFORD, RAILWAY LABOR EXECUTIVES' ASSOCIATION AND UNITED TRANSPORTATION UNION,

Petitioners,

v.

SOO LINE RAILROAD COMPANY, et al.,

Respondents.

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Soo Line Railroad Company (hereinafter "Soo Line") and Wisconsin Central Ltd. (hereinafter "Wisconsin Central")[1] respectfully request this Court to deny the petition for writ of certiorari filed by petitioners Robert F. Deford, Railway Labor Executives' Association (hereinafter "RLEA") and United Transportation Union[2] seeking review of the decision of the United States Court of Appeals for the Eighth Circuit in this case. In the interest of brevity, respondents submit this joint brief in opposition to the petition.

---

[1] In addition to Soo Line and Wisconsin Central, individual respondents are Dennis Cavanaugh, Edward A. Burkhardt, Thomas F. Power, and Robert H. Wheeler. The individual respondents join in and adopt the arguments set forth herein.

[2] Although the President of the United Transportation Union was a member of the RLEA at the time suit was filed, the United Transportation Union was not a party to the proceedings below and, therefore, is not a proper party petitioner in this Court. *See* 28 U.S.C. § 1254 (1982) ("Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case. . . .").

STATEMENT OF THE CASE

Soo Line is a Class I rail carrier subject to the jurisdiction of the Interstate Commerce Commission (hereinafter "ICC") under the Interstate Commerce Act (ICA), 49 U.S.C. §§ 10101-11917, and is a "carrier" as that term is defined in Railway Labor Act (RLA), 45 U.S.C. § 151 First. On April 2, 1987, Soo Line agreed to sell approximately 1,960 miles of its 7,750 miles of rail lines to Wisconsin Central. *Deford v. Soo Line R.R. Co.*, 867 F.2d 1080, 1082 (8th Cir. 1989). Wisconsin Central is an Illinois Corporation which was not a carrier until consummation of its purchase of the rail lines. Since the purchase, Soo Line and Wisconsin Central have been and continue to be completely independent and self-sufficient railroads.

1. Proceedings Before the Interstate Commerce Commission

The asset purchase agreement between Soo Line and Wisconsin Central was a cash transaction subject to financing and other customary conditions. Specifically, the transaction was subject to the ICC's regulatory approval pursuant to 49 U.S.C. § 10901, or exemption from approval pursuant to 49 U.S.C. § 10505 and the class exemption regulations promulgated thereunder by the ICC. *See* 49 C.F.R. §§ 1150.31-1150.34 (1986) (adopted by *Ex Parte 392, (Sub. No. 1), Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. § 10901*, 1 I.C.C.2d 810 (1986) (hereinafter "*Ex Parte 392*")), *review denied sub. nom. Illinois Commerce Comm'n v. I.C.C.*, 817 F.2d 145 (D.C. Cir. 1987).

Accordingly, on September 4, 1987, Wisconsin Central filed with the ICC a verified notice of class exemption announcing

its intention to acquire from Soo Line and to operate certain rail lines. No objections to the notice were filed. On September 10, 1987, however, the ICC sua sponte issued a decision staying the effective date of the notice and soliciting comments on the proposed transaction.[3]

On September 25, 1987, the RLEA filed comments with the ICC and requested an investigation and hearings concerning the proposed transaction. The RLEA specifically challenged the proposed transaction on the ground it would increase the risk that the ongoing operations of both Soo Line and Wisconsin Central would be threatened due to the leveraged nature of the proposed transaction. *See* Comments and Request for an Investigation and Oral Hearings of the Railway Labor Executives' Association at 6-9 (September 25, 1987). The RLEA filed detailed comments in support of its position, including the Declaration of Brian M. Freeman, a financial advisor to the RLEA, analyzing the financial strength of the transaction. Freeman specifically addressed the leverage issue and the supposed effect it would have upon Soo Line employees.[4] Joint Appendix in 8th Cir. No. 87-5376 (hereinafter "J.A.") 103-130.

On October 8, 1987, after evaluating the comments of the RLEA and others,[5] the ICC issued a decision lifting the stay.

---

[3] On September 11, 1987, Wisconsin Central and Soo Line filed petitions for reconsideration of the stay. On September 18, 1987, the ICC denied the petitions.

[4] Inconsistent with its alleged concerns over the leveraged nature of the transaction, RLEA members, through Mr. Freeman, sought to purchase the same rail lines that Wisconsin Central purchased. Only after the bid was rejected did the RLEA raise the instant objections. *See* J.A. at 11-13 (referring to the RLEA proposal made by Freeman).

[5] The Brotherhood of Locomotive Engineers and petitioner United Transportation Union also filed notices of opposition with the ICC.

Wisconsin Cent. Ltd.—Exemption Acquisition and Operation—Certain Lines of Soo Line R.R. Co., Finance Docket No. 31102 at 2 (October 7, 1987) (reprinted as Appendix B hereto at A-41-A-46). In its decision, the ICC specifically noted that the RLEA and others had expressed concerns about the proposed transaction, but found that the concerns "may be adequately addressed in the context of petitions to revoke the exemption, the usual procedure for resolving issues raised in class exemption proceedings." *Id.* at A-44. Thus, the ICC indicated it would retain jurisdiction to scrutinize the transaction and would entertain petitions to revoke the exemption.

On October 11, 1987, Soo Line and Wisconsin Central completed the transaction. On December 29, 1987, the RLEA filed with the ICC a petition for revocation of the exemption. In its petition, the RLEA again challenged the financial aspects of the transaction and its impact on the rights of employees under railway labor agreements. *See* Railway Labor Executives' Association's Petition for Revocation of the Exemption, Petition for Discovery and Request for Oral Hearing, Finance Docket No. 31102 (December 30, 1987). On July 8, 1988, the ICC issued a lengthy opinion and order refusing the revoke the exemption. *Wisconsin Cent. Ltd.—Exemption Acquisition and Operation—Certain Lines of Soo Line R.R. Co.*, Finance Docket No. 31102 (July 8, 1988) (hereinafter "Revocation Decision") (set forth herein as Appendix A at A-1 - A-40).

Specifically, the ICC analyzed in detail the financial aspects of the transaction and concluded Wisconsin Central's financial position was stable. The decision stated:

> We have employed and disclosed confidential information submitted by the petitioners in conducting our analysis, discussed herein, as to whether the terms of the sales

> agreement of the trackage rights agreement or any other aspect of this transaction appear to create a carrier which will be so financially weak as to be unable to provide adequate transportation service to the public. On the basis of that analysis, we have declined to grant RLEA's petition for revocation.

Id. at A-27.

2. The Instant Action

On June 12, 1987, petitioner Deford and petitioner RLEA filed the instant action in Minnesota state district court. Petitioners' complaint alleged claims under the Minnesota Fraudulent Conveyances Act, Minn. Stat. §§ 513.20-513.32 (1986) (recodified as amended at Minn. Stat. §§ 513.41-513.51 (1988)). In essence, the complaint alleged three theories of recovery. First, it alleged the sale of Soo Line assets to Wisconsin Central violated the fraudulent conveyances act because the proceeds of the sale would be distributed to Soo Line shareholders leaving Soo Line with an unreasonably small amount of capital for future operations, thereby impairing the rights of Soo Line employees and the RLEA as creditors of Soo Line. *See* J.A. at 8-35. Second, it alleged the transaction would be fraudulent as to Soo Line employees who would subsequently work for Wisconsin Central because Wisconsin Central's secured lenders, who presumably loaned funds to finance the acquisition, would have superior claims to Wisconsin Central's assets. *Id.* Third, it alleged the transaction was intended to circumvent contractual obligations with employees and unions and thus, Wisconsin Central and Soo Line tortiously interfered with creditors' rights and conspired to frustrate creditors' rights. *Id.*

Concerning Petitioners' claims as creditors, the complaint stated:

> Claims of Deford and the Class [of similarly situated Soo Line employees] include, but are not limited to, the following: accrued but unpaid labor protection pay; accrued but unpaid life, health, and/or accident insurance premiums, accrued but unpaid pension plan contributions; and contingent claims with respect to each of the foregoing which could reasonably be expected to arise out of the transaction at issue here. RLEA claims include various "check-off" items for which Soo Line is directly indebted to RLEA.

J.A. at 25.

On July 1, 1987, respondents filed a petition for removal to the United States District Court for the District of Minnesota. J.A. at 43-48. Thereafter, petitioners moved to remand the matter to state court and respondents moved to dismiss for failure to state a claim upon which relief may be granted. J.A. 53-58, 59-61. On August 21, 1987, the district court denied Petitioners' motion and granted Respondents' motion to dismiss. *See* Petition for Writ of Certiorari, Appendix D.

In so ruling, the Court stated:

> The basic injury asserted in this case arises from the employment relationship between the Plaintiffs and the Defendant railroad. The existence and extent of any rights Plaintiffs may have are dependent upon the interpretation then of their Railway Labor Agreement. The interpretation of a contract of employment with a railroad is exclusively under the [RLA] and involves a minor dispute according to that statute.

Petition for Writ of Certiorari, Appendix B at 32a. Thus, the district court found removal proper because Section 3 First of the RLA completely preempted petitioners' state law claims. Thereafter, the district court dismissed the action on the ground that petitioners' claims presented a minor dispute subject to the exclusive jurisdiction of the National Railroad Adjustment Board. *Id.* at 33a-34a.[6]

On appeal, the Eighth Circuit agreed with the district court that Section 3 First of the RLA completely preempts petitioners' state law fraudulent conveyance claims. The Court specifically found that, "[t]he existence and extent of the creditor's rights asserted by Deford and the RLEA . . . can be determined only by interpreting the collective bargaining agreements." *Deford v. Soo Line R.R. Co.*, 867 F.2d 1080, 1086 (8th Cir. 1989). In addition, the Court noted that in a separate action in Illinois federal district court the RLEA alleged that the proposed transaction would affect the rates of pay, rules and working conditions set forth under various collective bargaining agreements and sought an order requiring the carrier to comply with the terms of the RLA and to engage in mandatory arbitration. *Id.* at 1087.

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[6] The district court did not reach the question whether the ICA also preempted petitioners' state law claims. It stated:

> The argument has obviously much focused on the Interstate Commerce Act and its preemptive aspect, that is because the parties appear to have tacitly agreed that this dispute goes to the validity of and the viability of the sale of a portion of the Soo Line to Wisconsin Central, Limited. That may well be the prime dispute but the Minnesota cause of action and that before this Court concerns rights arising under the present existing Labor Act and the Plaintiff's perception that its rights are in jeopardy. This focus leads the court to conclude that the Railway Labor Act provides a proper analytic mode.

Petition for Writ of Certiorari, Appendix B at 31a.

Based on these findings the Court stated:

> In this case the creditors rights asserted are based upon the terms of the collective bargaining agreements and the Minnesota Statute only provides an additional method for enforcing the terms of the agreements. We therefore affirm the district court's finding that Deford's claims directly involve the collective bargaining agreements and constitute "minor disputes" under the RLA.

Id.

The Eighth Circuit also found that the provisions of the ICA governing the sale of rail assets and the regulations promulgated thereunder completely preempt petitioners state law claims. In so finding, the Court first noted the broad authority Congress granted the ICC to govern railway transactions, including the specific authority to exempt acquisitions from the approval process set forth in 49 U.S.C. § 10901. *Deford*, 867 F.2d at 1088. Moreover, the Court noted that petitioners submitted extensive comments to the ICC both before the ICC lifted its stay of the effective date of the class exemption and in a petition to revoke the exemption. Petitioners' comments argued the financial aspects of the transaction and urged the ICC to deny the exemption or to impose labor protective conditions. *Id.* at 1090. The Court noted that "after a detailed analysis, the ICC concluded Wisconsin Central's financial position was stable and that it would not revoke the exemption nor impose employee protective conditions." *Id.*

Based on the broad authority the ICC exercises over rail line transfers and petitioners' extensive participation in the ICC exemption review process, the Eighth Circuit concluded:

> RLEA's present attack on this transaction is no more than an attempt to annul or set aside the ICC's decisions

> with respect to this rail transaction under the exemption procedures. We therefore find it impossible to grant the relief Deford and the RLEA seek here without impinging on the ICC's order. We conclude that when such a collateral attack is brought in state court under the guise of state law, the ICA necessarily completely preempts the state law claims and the suit is removable to federal court.
>
> . . . .
>
> In sum, we believe that the ICA demonstrates Congress' intent to delegate to the ICC the exclusive responsibility to evaluate all aspects, including financial viability, of rail line transfers. The ICA provides both a forum and a set of remedies that is exclusive and completely preempts competing state law claims.

Id. at 1090-91.[7]

Thus, the Court of Appeals found both Section 3 First of the RLA as well as the provisions of the ICA governing the sale of rail assets completely preempted petitioners' state law

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[7] Dissenting from the Eighth Circuit's opinion, Chief Judge Lay believed neither the RLA nor the ICA justified removal under the complete preemption doctrine. *Deford*, 867 F.2d at 1091. With respect to the RLA, the dissent opined that because state law, in this case the Fraudulent Conveyances Act, creates an entitlement independent of the collective bargaining agreement, no interpretation of that agreement was necessary and therefore the state law action was not preempted. *Id.* at 1092. Concerning the ICA, the dissent argued that neither the ICC's broad grant of jurisdiction found in 49 U.S.C. § 10102(26) nor other specific grants of jurisdiction found in the ICA is sufficiently pervasive in scope to justify complete preemption. *Id.*, 867 F.2d at 1092-93. In addition, the dissent based its conclusion on its belief that the ICC did not reach the merits of the claims that would have been raised in the fraudulent conveyance action. *Id.* at 1093.

claims and formed an appropriate basis for removal. Having found the district court properly entertained removal jurisdiction, the Court of Appeals affirmed the district court's dismissal of the action.

REASONS FOR DENYING THE WRIT

This Court has recently set forth in detail the jurisdictional framework governing removal of federal question cases stating:

> Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal question jurisdiction is required. The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.

Caterpillar Inc. v. Williams, 482 U.S. 386, ——, 107 S.Ct. 2425, 2430 (1987) (citing *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13 (1936) (footnotes omitted); *see also Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, ——, 107 S.Ct. 1542, 1546 (1987); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12-13 (1983).

Under the "well-pleaded complaint rule," however, a plaintiff may not defeat federal jurisdiction by deliberately excluding a federal claim from its complaint if relevant federal law so pervasively occupies or regulates a field that a competing state law claim necessarily invokes federal law. *See Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. at 1246. In such a case the plaintiff's claims are "necessarily federal in character" and the preempting statute "converts an ordinary state

common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id.*, 107 S. Ct. at 1547; *see also Caterpillar Inc. v. Williams*, 107 S. Ct. at 2430 ("Once an area of state law has been completely preempted, any claim purportedly based on the preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law.").

Applying the complete preemption doctrine, this Court has held that the proper inquiry is whether Congress intended to displace a state cause of action. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) ("the question whether a certain state action is preempted by federal law is one of congressional intent"). Moreover, this Court has recognized such an intent where interests in uniformity in implementing national policy require uniform federal interpretation. *See Metropolitan Life Ins. Co.*, 107 S.Ct. at 1547; *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 1044, ——, 107 S.Ct. 2161, 2166 (1987).

I. THE EIGHTH CIRCUIT'S DECISION IS CONSISTENT WITH THE COMPLETE PREEMPTION DOCTRINE AS SET FORTH IN THE DECISIONS OF THIS COURT.

Applying the principles set forth in this Court's opinions, the Eighth Circuit examined whether Congress intended to displace petitioners' state law claims through Section 3 First of the RLA or the provisions of the ICA relating to the acquisition of rail assets. In properly finding petitioners' claims under the Minnesota Fraudulent Conveyances Act completely preempted, the Eighth Circuit established no new law. Rather, the Eighth Circuit ruled in a manner that is entirely consistent with the complete preemption principles clearly set forth by this Court.

A. The Railway Labor Act

Congress enacted the RLA to promote stability in labor-management relations in the railroad industry. *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978). In furtherance of this policy, Section 3 First of the RLA provides for a mandatory and exclusive administrative grievance procedure to resolve so-called "minor disputes" arising out of collective bargaining agreements subject to the RLA.[8] *See* 45 U.S.C. § 153 (1)(i) (1982). Pursuant to the administrative procedure, the RLA grants the National Railroad Adjustment Board (NRAB) exclusive jurisdiction to resolve such minor disputes. *Id.* "A party who has litigated an issue before the [NRAB] on the merits may not relitigate that issue in an independent judicial proceeding." *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972).

Recognizing the national transportation policy Congress set forth in the RLA and the stability in labor relations Congress sought to promote by placing responsibility for interpreting collective bargaining agreements solely within the NRAB, the Eighth Circuit held that "it was Congress' intent that the RLA govern all railway labor disputes such as those in this case arising from collective bargaining agreements." *Deford*, 867 F.2d at 1086. In so holding, the Eighth Circuit noted the overwhelming case law supporting the preemptive force of the RLA. *Id.* at 1085 (citing *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 321 (1972); *Schroder v. Trans World Airlines Inc.*, 702 F.2d 189, 192 (9th Cir. 1983); *Beers v. Southern Pac. Transp. Co.*, 703 F.2d 425, 427 (9th

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[8] Minor disputes involve interpretation or application of an existing collective bargaining agreement. *See, e.g., Elgin, Joliet & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945).

Cir. 1983); *McKinney v. International Association of Machinists & Aerospace Workers, District Lodge No. 1450*, 624 F.2d 745, 747 (6th Cir. 1980)).

In addition, the Eighth Circuit cited with approval case law holding that this Court's conclusion in *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968)—that Section 301 of the Labor Management Relations Act (LMRA) completely preempts state law—requires a finding that Section 3 First of the RLA also completely preempts state law because the two sections serve essentially the same function. *Deford*, 867 F.2d at 1085-86 (citing *Leu v. Norfolk & W. Ry. Co.*, 820 F.2d 825, 839 (7th Cir. 1987); *Graf v. Elgin, Joliet & E. Ry. Co.*, 790 F.2d 1341, 1346 (7th Cir. 1986)). Thus, the Eighth Circuit found that "the complete preemption doctrine applies to collective bargaining disputes under the RLA." *Deford*, 867 F.2d at 1086.

Applying this principle, the Eighth Circuit found petitioners' claims completely preempted. Although couched in terms of state law, petitioners' claims actually and necessarily arise out of and present a dispute concerning interpretation of the relevant collective bargaining agreements. Thus, the Eighth Circuit concluded that because the relevant railway labor agreements form the basis of the rights asserted by petitioners and state fraudulent conveyance law "only provides an additional method for enforcing the terms of the agreements," petitioners' state law claims constitute a minor dispute under the RLA and are completely preempted. *Id.* at 1087.

Petitioners contend that the Eighth Circuit erred in several respects in reaching its conclusion. First, they argue that the Eighth Circuit erred in equating Section 3 of the RLA to Section 301 of the LMRA. Specifically, petitioners contend that Section 3 First lacks the pervasive nature of Section 301 because it grants the NRAB and not the federal courts exclusive

jurisdiction to construe or to enforce collective bargaining agreements.

Yet, both Section 3 First of the RLA and Section 301 of the LMRA are intended to promote stability and uniformity in the resolution of disputes arising out of collective bargaining agreements. *Deford*, 867 F.2d at 1086. That Congress may have chosen the NRAB over the federal courts as the appropriate vehicle to promote its policies does not indicate that Congress intended Section 3 First to be any less pervasive. In fact, the choice of an administrative forum for resolution of disputes arising out of railway labor agreements is an even stronger indication of an intent to completely preempt state law, given the recognized purpose of Section 3 of the RLA to provide "effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective bargaining agreements" by keeping minor disputes "within the adjustment board and out of the courts." *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978). Accordingly, Section 3 First of the RLA presents even stronger evidence of Congressional intent to completely preempt state law than Section 301 of the LMRA.

Alternatively, petitioners argue that even if Section 3 First of the RLA completely preempts state law claims arising out of railway labor agreements, petitioners' claims in this case are not preempted because they do not require construction or interpretation of any relevant railway labor agreements. This argument, however, mischaracterizes petitioners' claims. Unlike the claims at issue in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. —, 56 U.S.L.W. 5412 (1988), petitioners' claims do not exist without interpretation and application of the relevant railway labor agreements. The rights petitioners assert under state law require that they first must be creditors. *See* Minn. Stat. § 513.20 (1987) (recodified as amended at Minn.

Stat. § 513.41 (3) and (4) (1988)). Petitioners' status as creditors arises solely under the terms of the relevant railway labor agreements. Since the petitioners' status as creditors—which status is a prerequisite to recovery under the state fraudulent conveyance act—"ultimately depends upon the terms of the agreement between the parties . . . [their claims] . . . are tightly bound with questions of contractual interpretation that must be left to federal law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 216 (1985).

Moreover, petitioners' contention that their claims do not require interpretation or construction of the railway labor agreements is particularly disingenuous in light of the separate action the RLEA filed in Illinois federal district court. The action sought to invoke RLA arbitration processes with respect to the sale. The action specifically alleged that Soo Line employees' rates of pay, rules and working conditions under various railway labor agreements between Soo Line and RLEA member unions would be affected by the sale. *See Railway Labor Exec. Ass'n v. Soo Line R.R. Co.*, No. C 5293 (N.D. Ill. 1987) (Westlaw, Allfeds library, DCT file). Yet, protection of economic rights allegedly conferred by railway labor agreements cannot be simultaneously subject to exclusive arbitration under the RLA and to potentially inconsistent state law.

In sum, whatever rights state fraudulent conveyance law may give creditors in general, petitioners' status as creditors arises out of and depends solely on interpretation and construction of applicable railway labor agreements. The pervasive nature of Section 3 First of the RLA and the exclusive jurisdiction of the NRAB over disputes arising out of railway labor agreements evidence a clear congressional intent to completely preempt state law actions dependent upon or arising out of a railway labor agreement. The Eighth Circuit correctly affirmed the district court.

B. The Interstate Commerce Act

The ICA gives the ICC exclusive jurisdiction to approve and to regulate acquisitions of rail lines. *See, e.g.*, 49 U.S.C. §§ 10901, 11343(a) (1982); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318-20 (1981). Specifically, Section 10901 of 49 U.S.C. governs the acquisition of rail lines by non-carriers and requires a non-carrier to obtain ICC approval of such acquisitions. *See, e.g., Texas & New Orleans R.R. Co. v. Northside Belt Ry. Co.*, 276 U.S. 478, 480-81 n. 1 (1928) (citing cases setting forth the ICC's interpretation requiring approval); *Railway Labor Exec. Ass'n v. Pittsburgh & Lake Erie R.R. Co.*, 845 F.2d 420, 425 (3rd Cir. 1988) ("Section 10901 of the Act governs the acquisition of rail lines by non-carriers").

In 1976, Congress' concern about the financial conditions prevailing in the railroad industry led to enactment of the Railroad Revitalization and Regulatory Reform Act. *See generally* Pub. L. No. 94-210, 90 Stat. 31 (1976). Among other things, the Act granted the ICC authority to exempt individual transactions or classes of transactions from the approval requirements found in 49 U.S.C. § 10901. Pub. L. No. 94-210, 90 Stat. 42 (1976). Subsequently, in order to further reduce regulatory barriers to entry into and exit from the industry, Congress broadened the relevant exemption provisions providing that the ICC "shall" exempt a transaction from approval requirements if the approval is not necessary to carry out the transportation policies set forth in 49 U.S.C. § 10101(a) and the transaction is of limited scope or the approval is not needed to protect shippers from the abuse of market power. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1912-13 (codified at 49 U.S.C. § 10505).

In 1986, after notice and review of comments submitted by twenty-two parties including petitioners RLEA and United Transportation Union, the ICC responded to the congressional directive contained in the Staggers Rail Act by adopting regulations granting a class exemption for acquisitions and operations requiring approval under 49 U.S.C. § 10901.[9] *See Ex Parte 392*, 1 I.C.C.2d at 817.[10] In adopting the class exemption, the ICC expressly considered arguments that Class I carriers such as Soo Line "would attempt to divest themselves of marginally profitable lines and that the new carrier would not be financially viable and might not be able to provide adequate service." *Id.* at 812. The ICC responded that "[c]ommentators' concerns about the financial viability of new carriers are not supported by any specific evidence." *Id.* In addition, the ICC noted that:

> Transfer of a line to a new carrier that can operate the line more economically or more effectively than the existing carrier serves shipper and community interests by continuing rail service, and allows the selling railroad to eliminate lines it cannot operate economically. Transfer

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[9] The class exemption does not apply where "another class I railroad abandons a line and a class I railroad then acquires the line in a transaction that would result in a major market extension as defined at 49 CFR 1180.3(c)." 49 C.F.R. § 1150.31 (1986); *Ex Parte 392*, 1 I.C.C.2d at 810.

[10] Pursuant to the regulations adopted by the ICC and applicable to this case, the exemption becomes effective seven days after it is filed with the ICC. 49 C.F.R. § 1150.32(b) (1986). The ICC has subsequently amended its regulations slightly expanding the notice requirements for transactions creating new Class I or Class II railroads. The regulations now provide for a pre-filing notice period of at least 14 days and for a post-filing notice period of at least 21 days. *See* 49 C.F.R. § 1150.35 (1988); *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901*, 4 I.C.C.2d 309 (1988).

> before a financial crisis (with attendant plans for abandonment) helps assure continued viable service.

Id. at 813. Thus, the ICC rejected a requirement that new carriers demonstrate their financial ability, reasoning that "smaller carriers are more dependent on local traffic, have a greater incentive to provide service tailored to the needs of shippers, and may make more efficient use of abandoned or underused rail property." *Id.*

Moreover, in promulgating its exemption regulations, the ICC also considered suggestions that the required notice of exemption "be broadened to include more detailed financial and operating data." *Id.* at 817. The ICC rejected the suggestions and eliminated a proposed rule requiring the notice of exemption to include "[t]he amount of projected revenues that will be generated in the first year by operations of the property." *Id.* The proposed rule set forth in Fed. Reg. 3488, which was to be codified at 49 C.F.R. § 1150.33(h), was rejected by the ICC. In so doing the ICC stated that while it did not intend to minimize the concerns expressed in the suggestions, it believed the revocation procedure was "adequate and appropriate to handle the few unique cases, and a petition for stay can also be filed in the exceptional case." 1 I.C.C.2d at 817.

Finally, in adopting and implementing the class exemption regulations, the ICC has stressed the need for swift and certain processing of exemption notices recognizing that "[t]he ability to begin operations promptly is a key to the exemption's success." *Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. § 10901,* 4 I.C.C.2d 309 (February 11, 1988). As the Chairman of the ICC has stated:

> The beauty—to some, the problem—with the existing procedures is that the parties can know in advance the effec-

> tive date of their right to proceed. Opponents cannot therefore use the threat of protracted and expensive litigation to thwart a transaction or extract concessions that are not warranted by the public interest and would not be imposed by the Commission. The Commission retains full power after the fact to make any publicly required adjustments through revocation proceedings, the streamlined, management-by-exception format encourages the principals to concentrate on the marketplace, not the regulator.

Id. (separate comments of Chairman Gradison).

From the foregoing, it is clear that in promulgating class exemption regulations pursuant to congressional directive, the ICC considered and rejected, in a class-wide context, the type of arguments petitioners now seek to raise. Moreover, in doing so the ICC sought to provide interested parties swift and certain approval of proposed rail transactions, free of confusion and protracted litigation. By challenging in state court the Soo Line's sale of rail assets, petitioners disregard the delegated authority and expertise of the ICC and introduce into the transaction the very uncertainty the ICC designed the exemption process to avoid.

Notwithstanding the class exemption available to respondents, however, petitioners had the opportunity to raise specific financial arguments before the ICC. In its petition to the ICC for revocation of exemption, the RLEA submitted financial data and analysis relevant to the transaction. In response, Wisconsin Central submitted additional financial data. In rejecting the petition, the ICC summarized the financial evidence stating:

> Prior to consummation, WCL studied the lines using a computerized financial model to assist in developing op-

> erating expenses and financial data. Over 110 shippers, representing approximately 75 percent of the traffic base, were consulted concerning WCL's projected operation of the lines. Based on these studies, WCL determined that the present traffic volumes can support a profitable regional railroad. WCL projects a total first year traffic volume of 145,000 carloads, primarily of paper and related products, but also including coal, chemicals, malt, forest products and roofing granules. Its operating experience through January 1988 supports these estimates. Its originally projected operating ratio is 71 percent for 1988 with fixed charge coverage of 2.1. It anticipates that internal funds from operations will support a 5-year $36.6 million capital expenditure program. WCL's initial capitalization was $145 million, which included $15 million in equity and a cash balance of $13 million for working capital.

Revocation Decision at A-19-A-20. Based upon such information, the ICC concluded that, "RLEA's prediction that both WCL and Soo will fail as a result of the transaction is not supported by our analysis of the transaction. . . ." *Id.* at A-27. Thus, the record in this case clearly indicates that a federal forum and remedy was available to petitioners.

In sum, the statutory and regulatory framework set forth above and the scope of the revocation proceedings before the ICC evidence the broad authority Congress delegated to the ICC to regulate acquisitions of rail assets. Such broad authority and petitioners' extensive participation in the exemption process, clearly indicates a congressional intent to completely preempt the claims petitioners seek to raise under the guise of state fraudulent conveyance law. As the Eighth

Circuit stated, "[t]o allow Deford to now bring a state law action would be to disregard the ICC's authority and expertise in this matter." *Deford*, 867 F.2d at 1089.

Not surprisingly, the case law also supports the Eighth Circuit's application of this Court's complete preemption principles. In *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), the Court considered whether federal regulation of rail abandonment under the predecessor of 49 U.S.C. § 10901—former section 1(18) of the ICA—preempted state law. In finding that the federal regulations preempted state law causes of action for damages arising out of an abandonment, this Court stated that, "[t]he Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes." *Id.*, 450 U.S. at 324. In addition, this Court noted that "it would be inconsistent with [federal] policy . . . if local authorities retained the power to decide whether the carriers could do what the Act authorized them to do." *Id.* at 318 (quoting *Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 87 (1958)).[11]

In the instant case, however, petitioners seek to create such an inconsistency by placing authority in the hands of a state

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[11] Petitioners rely on *Hayfield N. R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984), as supporting their position. *Hayfield* is distinguishable, however, on the ground that it involved attempted state regulation after the ICC had brought its "regulatory mission to an end" and had allowed the carrier to abandon its line. *Id.* at 633. Significantly, even at that point, the Court limited its holding allowing the state to exercise its authority only so long as it did not "undo the very purposes for which the Commission authorized an abandonment." *Id.* at 633 n.11. In the instant case, the ICC expressly retained jurisdiction to revoke the exemption it has granted, and in fact entertained such an action allowing the petitioners to fully participate. *See* Revocation Decision, *supra*. In addition, the relief petitioners seek in state court is to undo the very transaction the ICC has authorized.

court to rescind a transaction the ICC has previously considered and authorized both in the general context of class exemption and on an individual basis in a petition for revocation. As the Eighth Circuit recognized, "it would be contrary to both the letter and the spirit of *Kalo Brick* to allow Deford and the RLEA to avoid the ICC's approval of the transaction . . . by pleading a state law claim." *Deford*, 867 F.2d at 1089.[12]

In sum, the statutory framework of the ICA and the class exemption regulations promulgated thereunder, the proceedings before the ICC relating to the transaction here at issue, and the relevant case law support the conclusion of the Eighth Circuit that:

> [t]he ICA demonstrates Congress' intent to delegate to the ICC the exclusive responsibility to evaluate all aspects, including financial viability, of rail line transfers. The ICA provides both a forum and a set of remedies that is exclusive and completely preempts competing state law claims.

Id. at 1091.

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[12] Petitioners attempt to distinguish *Kalo Brick* on the ground that it reserves the question whether a state cause of action lies "when no application is made to the Commission." In response, it is first important to note that the application referred to by the Court is that of the carrier. The case is clear that although *Kalo Brick* appeared in opposition to the respondent's application to the ICC, Kalo Brick failed to perfect its filing before the Commission. 450 U.S. at 314. Second, as in *Kalo Brick*, the ICC actually considered the carriers' position in this case. Third, as demonstrated *supra*, if anything, petitioners are in a weaker position than their counterpart in *Kalo Brick* because the Commission actually considered the merits of their contentions.

II. THE APPARENT CONFLICT OF A DECISION OF THE THIRD CIRCUIT WITH THE EIGHTH CIRCUIT'S DECISION DOES NOT WARRANT REVIEW.

In its decision, the Eighth Circuit acknowledged the Third Circuit's decision in *Railway Labor Exec. Ass'n v. Pittsburgh & Lake Erie R.R. Co.*, 858 F.2d 936 (3d Cir. 1988) (hereinafter "*P&LE*"), reaching a contrary result. Relying on *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24-26 (1983), the Third Circuit identified the threshold issue to be "whether the statute relied upon by the defendant as preemptive contains civil enforcement provisions within the scope of which the plaintiff's state claim falls." 858 F.2d at 942. In contrast, the Eighth Circuit found the approach in *P&LE* "unnecessarily narrow." *Deford*, 867 F.2d at 1086. Thus, the Eighth Circuit found that in addition to the factors identified in *P&LE*, the history and purpose of the federal statute must also play an important role in the fundamental inquiry whether Congress intended to displace state causes of action. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985).

Although the Eighth Circuit's opinion correctly states and applies the law relating to the complete preemption doctrine set forth by this Court, it is important to note a factual distinction between the instant case and *P&LE*. In adopting class exemption regulations, the ICC found that "the fact that in the future there may be a few proposals out of hundreds that require an investigation does not preclude us from concluding that regulation of *substantially all* of these transactions is not necessary to carry out the national transportation policy." *Ex Parte 392*, 1 I.C.C.2d at 812. Rather, the ICC indicated that "[i]n light of the explicit legislative directive to grant exemp-

tions and then rely on after-the-fact remedies, including revocation, the potential for total or partial reimposition of regulation is always present." *Id.*

In the instant case, the ICC confirmed that despite considering and rejecting generalized arguments concerning the financial viability of acquiring parties in promulgating its class exemption rules, petitioners' specific concerns regarding the financial viability of Wisconsin Central and Soo Line "may be adequately addressed in the context of petitioners to revoke the exemption." Appendix B at A-44. Thus, in the instant case, the RLEA actually submitted to the ICC a petition for revocation setting forth its contention that, among other things, neither Soo Line nor Wisconsin Central would be able to meet their financial obligations as a result of the transaction. Revocation Decision at A-14-A-17. The ICC actually considered the RLEA's contentions and rejected them. *Id.* at A-27. In contrast, the transaction at issue in the *P&LE* case failed before the ICC had an opportunity to consider the RLEA's concerns regarding financial viability. *See* RLEA's Motion for Dismissal of Complaint upon Suggestion of Mootness, *Railway Labor Exec. Ass'n v. Pittsburgh & Lake Erie R.R. Co.*, Finance Docket Nos. 31121, 31122, 31126 (November 3, 1988); *see also* Brief for the Interstate Commerce Commission at 6 n.5, *Pittsburgh and Lake Erie R.R. Co. v. Railway Labor Exec. Ass'n.*, Nos. 87-1589, 87-1888 (U.S. January 1989) (stating that RLEA's petition is pending before the Commission). Thus, the concern expressed in *P&LE* that federal law did not provide a forum in which to attack a rail acquisition on financial grounds, *P&LE*, 858 F.2d at 942, is adequately addressed in the instant case because the ICC actually considered petitioners' claims in the context of their revocation petition.

In addition, it is important to note that the Third Circuit did not address the mootness issues raised by the failure of the transaction at issue in *P&LE*. *Id.* In contrast, since consummation of the transaction here at issue, Wisconsin Central has been and continues to be a completely independent and self-sufficient railroad. Therefore, in sharp contrast to the theoretical jurisdictional question the Third Circuit addressed in *P&LE*, the Eighth Circuit confronted the very real question whether a state court possessed the authority to terminate the operations of a successful and ongoing regional rail enterprise. *Cf. Franks v. Bowman Transp. Co.*, 424 U.S. 747, 755 (1976) (stating that the mootness doctrine assures "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions"). In sum, although the Third Circuit's decision in *P&LE* is in apparent conflict with the Eighth Circuit's decision in the instant case, the fact that the transaction at issue in *P&LE* never took place counsels against using the *P&LE* decision as a basis for exercising this Court's discretionary review.[13]

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[13] Petitioners also contend the Eighth Circuit's decision conflicts with *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987). *Price*, however, dealt solely with the issue whether Section 2 Fourth of the RLA, 45 U.S.C. § 152 (1982), completely preempted state law claims for wrongful discharge in retaliation for union organizing activities. *Price*, 829 F.2d at 874. The Ninth Circuit examined Section 2 Fourth and found that although an implied private right of action exists under the Section 2 Fourth, there was insufficient evidence of congressional intent to displace state law to support a finding of complete preemption. Given the totally distinct histories, purposes, and remedial frameworks of Section 3 First and Section 2 Fourth, the Ninth Circuit's decision concerning the preemptive effect of Section 2 Fourth does not present a conflict to this Court.

III. THIS CASE IS NOT OF SUFFICIENT IMPORTANCE AND CONCERN TO WARRANT DISCRETIONARY REVIEW.

In a number of recent opinions, this Court has clearly set forth the principles the federal courts must follow in deciding issues concerning the doctrine of complete preemption. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 56 U.S.L.W. 4512 (1988); *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851 (1987); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). The Eighth Circuit's opinion in this case, far from constituting "a dramatic expansion of the complete pre-emption doctrine," Petition for Writ of Certiorari at 22, faithfully follows the clear principles set forth in this Court's cases concerning complete preemption. Further clarification of the complete preemption doctrine in the context of this case will not produce additional clarity or meaningful development in the law.

Certainly, rail transactions such as that at issue in this case represent a significant development in the nation's rail transportation policies. By requiring the ICC to exempt classes of rail transactions, Congress has been in the forefront of the policy development. *See* 49 U.S.C. § 10505 (1982). Through the ICA and the RLA, Congress has sought to develop nationwide policies that encourage efficient use of the nation's railroad resources. The policies represent a careful balance of the interests of many varied groups and regions. As a result of the balance that has been struck, the short-line and regional rail sector has enjoyed substantial growth and has created jobs and service where abandonment once appeared imminent.

This Court must not allow petitioners to frustrate carefully crafted and successful national rail policy by using state law to create confusion, to threaten recisions of completed rail asset acquisitions, or to break up strong and competitive regional rail carriers.

CONCLUSION

For the reasons set forth above, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

WISCONSIN CENTRAL LTD. — EXEMPTION ACQUISITION AND OPERATION — CERTAIN LINES OF SOO LINE RAILROAD COMPANY

Finance Docket No. 31102

INTERSTATE COMMERCE COMMISSION

July 8, 1988

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Simmons concurred in the result with a separate expression. Commissioner Lamboley dissented and will submit a separate expression at a later date.

OPINION:

On September 4, 1987, Wisconsin Central Ltd. (WCL), a non-carrier, filed a notice of exemption under 49 CFR 1150.31 to acquire and operate 1,801 miles of the Soo Line Railroad Company (Soo) rail line in Wisconsin, the upper peninsula of Michigan, Eastern Minnesota, and northern Illinois.[1] Additionally, WCL acquired 173.6 miles of trackage rights over Soo lines, and Soo assigned 27.7 miles of related trackage rights on two third party carriers.[2] WCL has also negotiated the purchase of 206.7 miles of line currently abandoned by Soo[3] but does not now seek Commission authorization to operate over that abandoned property.

We stayed the notice of exemption by decision issued September 11, 1987, noting that the proposal contemplated an

[1] See Appendix A, Part 1.

[2] See Appendix B.

[3] See Appendix A, Part 2.

"unusually large and significant transaction." On September 22, 1987, we denied a petition for reconsideration of the stay in order to consider comments which we had solicited in our September 11 decision and which we had not yet received. On October 8, 1987, in response to overwhelming public support for the transaction and requests that we lift the stay and allow the transaction to go forward, we vacated the stay and permitted the transaction to be consummated. We stated then that we would issue a further decision addressing the comments which we received. We do so here.

On October 11, 1987, WCL consummated the purchase and began operations. We have studied this transaction to determine the propriety of using class exemption procedures[4] for this large transaction, the adequacy of information provided, the transaction's competitive effects, and its effects on labor interests. Since the consummation, two petitions to revoke have been filed, one by the Railway Labor Executives' Association (RLEA) and one by the Organization of Minority Vendors, Inc. (OMV). We deny the requests for discovery, investigation, and revocation.

With the partial deregulation brought about by the Staggers Rail Act of 1980, the Commission has followed a consistent policy of aiding the development of new and innovative rail operations and discouraging the abandonment of rail lines when opportunities for continued viable rail operations are available. One overwhelmingly beneficial result of these policies has been the formation by non-carriers of numerous short-

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[4] The Commission exempted non-carrier acquisition of rail lines from the requirements of 49 U.S.C. 10901 in Class Exemption for the Acquisition and Operation of Rail lines under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985), aff'd sub nom. Illinois Commerce Commission v. ICC, 817 F.2d 145 (D.C. Cir. 1987) (Exemption—Acq. & Op.).

line and regional railroads under our class exemption from the formal requirements of Section 10901 for new rail acquisitions. WCL's use of this class exemption has received extensive public support. The decision that follows concludes that application of Commission policy (which promotes opportunities for continued rail service by new entities without extensive prior regulatory review) to the present transaction is in the public interest.

PRELIMINARY MATTER — TREATMENT OF CONFIDENTIAL INFORMATION

In our decision served September 22, 1987, we placed under seal several documents that WCL volunteered under a request that they be kept confidential. The documents include the Asset Purchase Agreement, dated April 2, 1987, and final drafts of trackage rights agreements (1) for WCL to operate over Soo Lines between (a) Withrow and St. Paul/Minneapolis, MN, (b) Duplainville and Milwaukee, WI, and (c) Superior and Ladysmith, WI, and (2) for Soo to operate over WCL's lines betwen (a) Withrow, MN and Dresser, WI, (b) New Lisbon and Wausau, WI and (c) Duplainville, WI and Chicago, IL. Also included were final drafts of a voluntary coordination agreement, as amended by two appendices and an agreement on "divisions and rates" also amended by two supplemental draft documents dated September 9, 1987.

The Wisconsin/Upper Michigan Rail Users Committee, et al. (Rail Users Committee), RLEA and the Wisconsin Department of Transportation (WisDot) have challenged our decision to keep the information confidential arguing that this treatment of evidence is not in the public interest. Our rules provide for confidential treatment of proprietary information. 49 CFR 1104.14 and 1114.21 et seq. The Commission has the discretion to determine whether to release con-

fidential information and this treatment is regularly accorded to parties in this type of proceeding. See, e.g., Finance Docket No. 30891, Paducah & Louisville Railway, Inc. - Acquisition and Operation Exemption - Illinois Central Gulf Railroad Company, (not printed), served January 28, 1988.

We accepted WCL's documents under seal because they resolved factual allegations and concerns expressed to the Commission over the acquisition that initially prompted our stay and our investigation and because release of the information could have adverse effects on WCL and on Soo. We did not order production of those documents and under our discovery rules, the production of documents in any proceeding before us is only available pursuant to our direct order. 49 CFR 1114.21(b)(2). Furthermore, our class exemption rules do not require their production. See 49 CFR 1150.33. WCL could have pursued less candid approaches to persuade the Commission to lift the stay. Instead WCL made a complete disclosure of those aspects of the transaction that prompted the most concern, particularly the restrictions on the rights transferred to WCL. We encourage this candor.

Our review of the parties' expressed reservations over the acquisition demonstrated no need for access to this information in order for any party to protect itself or to present its position to us. We will not release information potentially harmful to the providing party based on generalized complaints or broad discovery requests.[5] Discovery requests must show both that the evidence is relevant to the legitimate interests of the requesting party and is not otherwise available. Finance Docket No. 31116, Buffalo & Pittsburgh Railroad, Inc. - Exemption - Acquisition and Operation of Lines in

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[5] RLEA requested these documents and other information. RLEA's discovery motions are discussed separately infra at 12-13.

New York and Pennsylvania (not printed), served April 7, 1988 (Buffalo & Pittsburgh).

In affirming our September 22, 1987 decision not to make these documents public, we recognize the value of parties voluntarily providing such information when its availability would expedite our review of a matter that initially generates public concern. Unrestricted release of this information without a demonstration of specific need would discourage voluntary submission of proprietary information in future proceedings as well as punish WCL for its good faith attempt to show the effect of its acquisition. The submission of information under seal allows us to review the transaction in depth without exposing the information to use by competitors (or their shippers). Nevertheless, we may refer to confidential information and disclose that evidence, as required, in our decision. Santa Fe Southern Pacific Corp. - Control SPT Co., 2 I.C.C. 2d 709, 805, n.98 (1986).

We will disclose below information regarding this transaction sufficient to explain our reasons for concluding that further investigation or revocation of the exemption is not warranted. This information includes overhead traffic restrictions, Soo's trackage rights over WCL, and certain elements of the transaction affecting labor interests. In our disclosure, we have tried to maintain the confidentiality of most of the information provided, while assuring the public that the information sought to be disclosed would not warrant a contrary conclusion. We find that no competitive harm will occur to either WCL or Soo by our limited release of information received under seal.

In disclosing this information, we note that most if not all of it is or will be publicly available. A significant amount of the information, particularly regarding labor matters, has be-

come available through discovery in RLEA v. Soo Line R.R., Civ. No. 87 C 5293 (N.D. Ill. 1987).[6] Other information, including restrictions to WCL's trackage rights over Soo or Soo trackage rights over WCL, has or will become available either through tariff publications or as shippers use Soo's service over those lines. We do not take the release of this information lightly, especially in view of WCL's expectation in providing it to us. Nevertheless, on balance we believe this course to be appropriate.

BACKGROUND

WCL and Soo entered into the agreement of sale on April 2, 1987. The agreement was conditioned upon the parties obtaining either an exemption from or approval under 49 U.S.C. 10901, which governs non-carrier acquisitions and operations. The agreement provides for all necessary line transfers, easements, licenses, contracts, inventories, car and track materials, and ancillary agreements required for rail operations.

Pursuant to the agreement, WCL purchased approximately 2800 freight cars and 29 locomotives. Under the agreement Soo retains certain non-rail related easements and the right of first refusal to buy back the lines if WCL contracts to sell any or all of its lines to a Class I carrier or if WCL proposes to merge with a Class I carrier.

The sales agreement is supplemented by several voluntary coordination agreements and agreements on rate divisions. These agreements generally provide incentives for WCL to interchange traffic with Soo, to maintain existing rate levels,

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[6] In that proceeding, RLEA sought declaratory and injunctive relief to "enforce various commands of the Railway Labor Act," 45 U.S.C. 151 et seq. (RLA). RLEA sought to compel Soo to exhaust the collective bargaining processes of the RLA prior to consummation of WCL's purchase. RLEA's complaint and petition was rejected by decision of the court dated September 10, 1987.

and to provide for new divisions of revenues, based on existing rates and subject to a 25 percent minimum for the short haul. Both carriers agree to maintain alternative routes with other carriers and specifically preserve their rights of independent action to achieve their long hauls. Provisions are made for exchanges of information, solicitation of joint traffic, terminal switching charges, and coordination of service to improve "the quality, effectiveness and efficiency of their joint interline freight operations."

A substantial portion of the lines transferred comprised Soo's Lake States Transportation division (LST) which included some of the lines Soo obtained pursuant to the Commission's authorization of the sale of the core properties of the Chicago, Milwaukee, St. Paul and Pacific Railroad Co. (Milwaukee), to the Soo.[7] The LST lines were operated by Soo as a separate business unit. They are light density lines that averaged only 74 revenue movements per mile in 1986, but have been marginally profitable.

Besides its connections with Soo, WCL will connect with all roads serving Chicago and Minneapolis/St. Paul, MN, as well as with the Canadian Pacific Ltd. (CP), and Algoma Central Railway at Sault Ste. Marie, MI, and the Chicago & North

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[7] Chicago, M. St. P. & P. R.R. Co.—Reorganization—Acquisition by Grand Truck, 2 I.C.C.2d 161 (1984), aff'd, 2 I.C.C.2d 427 (1985), aff'd sub nom. In Re Chicago, M. St. P. & P. R. Co., 799 F.2d 317, 337 (7th Cir. 1986), cert. denied, 107 S.Ct. 2460 (1987) (Milwaukee). On February 19, 1985, Soo consummated its acquisition of the Milwaukee core and subsequently invoked the corporate reorganization class exemption (49 CFR 1180.2 (d)(3)) to merge Milwaukee Road, Inc., its subsidiary that operated the Milwaukee core, into itself. See Finance Docket No. 30761, Soo Line Railroad Company—Merger—The Milwaukee Road Inc.; Minneapolis, Northfield and Southern Railway, Inc. (not printed), served January 17, 1986 (Soo Line Merger).

Western Transportation Company, Escanaba & Lake Superior Railway Company, Green Bay & Western, Lake Superior & Ishpeming Railroad Company, Marinette, Tomahawk & Western Railroad Company, Nicolet Badger Northern Railroad, Wisconsin & Calumet Railroad, and Wisconsin & Southern Railroad Co. at various points throughout its system. WCL also has connections with other small carriers.

The sales agreement and especially the trackage rights agreements over lines retained by Soo, are subject to restrictive covenants. These restrictions preclude WCL from participating in overhead traffic Soo can or does handle. WCL's three trackage rights agreements with Soo grant WCL a non-exclusive right to use the lines, excluding "overhead traffic," which is defined as "any traffic originating at, terminating at, or moving through . . . [(1) Minneapolis/St. Paul, (2) Duluth/Superior or (3) Milwaukee] and not ultimately destined to or originating at (1) consignors or consignees physically located on trackage of . . . [WCL] or (2) points in Ontario west of Sudbury, in Upper Michigan or in Wisconsin north of Soo's main line between LaCrosse and Milwaukee." There are no other interlining restrictions, even on overhead traffic flows. The trackage rights agreements also preclude local service, assignment of rights to third parties, and generally any new construction. The detour or operation of foreign line equipment is at the sole discretion of Soo. The failure to observe these restrictions may result in Soo's unilateral termination of the trackage rights agreement(s).

An additional provision applies to the Ladysmith line, and it is the only such restrictive covenant in the sales agreement. If WCL handles "overhead traffic" or enters into an agreement with any other carrier that would allow WCL to handle overhead traffic through Duluth/Superior within 7 years

from the date of consummation, then WCL, at Soo's discretion, is obliged "to purchase, lease or otherwise acquire the Ladysmith Line." Disputes regarding the forced purchase will be referred to a panel of arbitrators.

WCL granted to Soo three separate trackage rights. First, Soo obtained a non-exclusive bridge right over approximately 26 miles of track between Withrow and Dresser, WI to a rock quarry operation, known as the Dresser Pit, and a contract right allowing Soo to purchase rock there for Soo's maintenance and construction requirements. Soo also retained a right of first refusal to purchase this line if WCL subsequently obtains abandonment authority for it.

Second, Soo is granted non-exclusive trackage rights over approximately 91 miles of track between New Lisbon and Weston, WI to provide unit train coal service to Wisconsin Public Service Corporation at Weston, WI. Soo also retained the right of first refusal to purchase if the line is subject to abandonment.

Third, Soo is granted approximately 92 miles of trackage rights between Duplainville, WI and Forest Park, IL. Additionally, the parties exchanged operational control of tracks in each other's ownership between Forest Park and Chicago, IL. This includes Soo's connecting track with the Indiana Harbor Belt Railroad. As part of this arrangement, Soo retained a temporary right to continue its operations at its Schiller Park, IL intermodal facilities until Soo either relocates the facility or discontinues its use. Soo also agreed to construct a new connection at Duplainville and to upgrade certain track at Schiller Park, IL prior to any discontinuance.

POSITIONS OF THE PARTIES

1. Comments. We have received and reviewed over 100 pleadings relating to this transaction and numerous letters

and comments from interested parties and press reports, as well as the comments of the Chicago and North Western Transportation Company (CNW), filed September 18, 1987, the Iowa Department of Transportation, filed September 25, 1987, and Michigan-Wisconsin Transportation Company, filed September 23, 1987. Generally, these comments support the WCL transaction.

For example, numerous corporations, including Mead, Nekoosa Paper Inc., D.C. Northam, Inc., Kimberly-Clark Corporation, Sadoff and Rudoy Industries, Kaytee Products, Vulcan Materials Company, Menasha Corporation, Weyerhaeuser Paper Company, and others, requested lifting of the stay and/or denial of the petition to revoke. While generally agreeing that WCL experienced the start-up problems common to new businesses, these corporations state that WCL service has improved significantly, that WCL employees have shown competence and enthusiasm in providing service, and that WCL provides essential rail service for them. Several corporations also state that WCL service is currently superior to that which they received from Soo, and shippers expect service to improve even more.

Government and other public groups also generally support the transaction. For example, the Area Development Committee of L'Anse, Michigan, Minnesota Department of Transportation, Central Upper Peninsula Planning and Development Regional Commission, Marshfield Area Chamber of Commerce and Industry, Transportation Development Association of Wisconsin, Illinois Department of Transportation, and Stevens Point/Plover Area Chamber of Commerce Transportation Committee all agree that WCL provides service critical to the economic well-being of their areas. Individual citizens, WCL employees, and Congressmen and Senators have also filed statements supporting the transaction.

A small number of negative or neutral comments were received from corporations or public groups. For example, GAF Chemicals Corporation detailed WCL start-up problems that it experienced during October 1987 and requested resolution of these problems. Similarly, the town of North Fond du Lac, WI remained neutral regarding the exemption and requested that we consider employee concerns and local economic impacts in making our determination. None of these parties has requested revocation of the exemption following the lifting of the stay.[8]

Rail Users Committee, an ad hoc coalition of shippers organized through the Wisconsin Paper and Pulp Manufacturer's Association, Inc., with the assistance of the Wisconsin Association of Manufacturers & Commerce, Inc., filed comments on September 8, 1987 and a petition to lift the stay of the transaction on September 11, 1987.

In its September 8 comments, the Rail Users Committee expressed concern over insufficient information relating to WCL's financial ability and operating plan, and competitive restrictions on WCL regarding bridge traffic trackage rights, gateways and interchange connections. It states that "there are restrictions on competition privately negotiated between the seller and purchaser which the shippers are entitled to have disclosed, to have the opportunity to contest and to be resolved. . . ." The Rail Users Committee requested that an investigation be instituted, and discovery authorized, and that the parties then either resolve the issues or request further specific Commission action.

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[8] Numerous Soo employees have also written us describing hardships they have undergone from losing jobs, seniority rights, and other benefits. Employees also argue that the transaction unfairly deprives them of protective conditions imposed when Soo acquired certain lines from the Milwaukee.

In its September 11 pleading, Rail Users Committee stated its "unequivocal support for the transaction to proceed under the class exemption." Rail Users Committee monitored the evolution of this transaction for an 18-month period prior to the filing of the notice of exemption. It notes that, during this time, service over LST lines deteriorated and became increasingly less competitive. It anticipates that, without WCL's operations, serious additional diversions of traffic would occur. The Rail User Committee fears that the regional rail system will be permanently lost without WCL. It notes that shippers refrained from making major modal commitments in anticipation of improved rail service by WCL. Loss of these shippers will place an increased burden on captive shippers to support the remaining operation of lines. It characterizes the transaction as a positive and procompetitive approach that is demonstrated in the availability of competing connections. Rail Users Committee concluded that no regulatory intervention is preferred to intervention that would jeopardize the transaction.

WisDOT filed a statement on September 10, 1987, supporting the transaction but also requesting an investigation although it had independently investigated the transaction, analyzed pertinent data and participated in various public meetings. WisDOT nevertheless supported the prompt consummation of the transaction as being in the public interest. WisDOT states that its request for an investigation is intended to allow affected parties sufficient time to determine the ramifications of the transaction so that they may decide whether to seek revocation of the exemption. It questions whether WCL will be a Class I or Class II carrier, but its major concern is over the competitive situation between Soo and WCL. It requests that any conditions on gateways, bridge

traffic and trackage rights under the WCL-Soo agreement be disapproved. Wisconsin DOT also requested a 180-day period for the parties to obtain information concerning the competitive aspects of the transactions, potential service and rates.

WisDOT also requests clarification of the impact of the Commission's exemption process, including whether WCL is subject to securities regulation by the State of Wisconsin or to review by WisDOT, whether abandoned rail lines in Wisconsin are subject to prior acquisition by the State before the restoration of service or before scrapping, whether WCL can abandon lines not previously approved for abandonment pursuant to the exemption, whether WCL is required to honor Soo transportation contracts under 49 U.S.C. 10713, whether previously ordered interchange conditions must be preserved by WCL, and whether previously imposed environmental conditions must be maintained.

On February 8, 1988, WisDOT filed a reply to a petition to revoke and requests for discovery and oral hearing filed by RLEA. It continues to support WCL and opposes RLEA's petition for revocation. It states: "WCL is providing essential freight rail service on 1,754 miles of operating lines in Wisconsin." (Reply, at 2) [Emphasis omitted.] WisDOT also expresses support for Commission policy in this area. WisDOT says that, in its view,

"the Commission's policy does preserve rail service in the private sector without government financial support; it does provide a better opportunity for protecting the employment prospects of affected labor; and it does avoid the piecemeal, segmented abandonment process that, even with governmental financial assistance, entails inherent service disruption or unprofitable operation until a sensible combination of abandoned lines can be linked together." (Reply, at 3-4).

2. Petitions for revocation: RLEA and the Organization of Minority Vendors. RLEA requests that the exemption be revoked in whole, or alternatively in part to provide employee protective conditions. It challenges the transaction on the basis that it is inconsistent with four elements of the rail transportation policy—subsections 10101a(10), encouraging "honest and efficient management of railroads"; 10101a(12) encouraging "fair wages and suitable working conditions"; 10101a(14) ensuring the availability of accurate cost information in regulatory proceedings; and 10101a(15) fostering "sound economic conditions in transportation." RLEA maintains that the sale was made economically feasible only because of the marked decrease in remuneration to WCL's employees. RLEA alleges that the sales agreement contains provisions that directly violated employee protective agreements resulting from Soo's acquisition of former Milwaukee lines.

In its evidence in this proceeding, RLEA includes a copy of its own purchase offer. In support of its comments, RLEA's financial advisor, Mr. Brian M. Freeman, states: "The value of labor cost reductions under almost all of the scenarios we have considered provides essentially the only justification for the purchase price." V.S. of Brian M. Freeman, dated September 18, 1987, page 10. He continues that increases in the traffic base are speculative and could be obtained by Soo if there were more effective management. His conclusion concerning the financial status of both WCL and Soo is that neither carrier is likely to be able to meet its financial obligations, particularly considering the "loss of commonality" for the LST lines with the Soo and CP.

RLEA maintains that ultimately WCL will fail because of the highly leveraged nature of the acquisition. The Commis-

sion's review of the transaction, RLEA maintains, is required to protect other creditors, shippers, employees and the public. It calls the consortium of lenders' endorsement of the transaction self-serving, because these creditors are protected by WCL's assets and would stand to profit if WCL fails. It points to the situation with the Pittsburgh and Lake Erie Railroad as indicative of a similar situation in which a highly leveraged company could no longer service its debt obligations. Accordingly, it maintains that WCL's acquisition is inconsistent with encouraging sound economic conditions under section 10101a (10). RLEA does not argue that the Commission must make a finding of financial fitness for WCL to acquire Soo's lines here, but rather that the Commission must determine that WCL is financially able to provide present and future service.

RLEA also objects to the requirement that WCL's new employees must relinquish their employee rights with Soo prior to being hired, and must subsequently depend on WCL, which RLEA maintains is financially unsound, for their future financial security. It maintains that this requirement is merely a means to circumvent collective bargaining agreements and previously imposed labor protective conditions. Under those agreements, any employee who resigns employment with Soo automatically forfeits any rights under those agreements.[9]

RLEA notes that in Soo Line Merger, supra, the Commission imposed the conditions developed in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock). It argues that these conditions remain in effect and the WCL acquisition is a transaction within the meaning of those conditions, which among other protections,

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[9] The resignation form provides that signatories relinquish their employment rights with Soo "but expressly reserve any claim" they have against Soo.

protect the seniority rights of affected employees. Soo's obligation under section 6(c) of the New York Dock conditions requires Soo to continue these protective benefits, even when furloughed employees have taken jobs with other employers, including other railroads. Such outside income is only allowed as an offset under the New York Dock conditions. These protections are also included in employee protection agreements entered pursuant to Milwaukee, supra. Among the employee protective agreements submitted to the Commission is that between the International Brotherhood of Electrical Workers and Soo, dated July 18, 1985, which contains both income and seniority right protections. RLEA maintains that the sales agreement violates these employee protections and requires corrective action by the Commission.

RLEA points to CNW's sale of its Fox River Valley lines considered in Finance Docket No. 31205, FRVR Corporation—Exemption Acquisition and Operation—Certain Lines of Chicago and Northwestern Transportation Company (FRVR),[10] as an indication of the adverse effect on competing rail carriers and their employees. It cites testimony in that proceeding that CNW could not compete with "WCL's lower wages,

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[10] Notice of exemption was made in Finance Docket No. 31205, FRVR Corporation—Acquisition and Operation Exemption—Chicago and North Western Transportation Company (not printed), served January 11, 1988, and supplemented in a notice served March 18, 1988. In unprinted decisions, we denied a request for a stay, served January 15, 1988; granted a petition for clarification and stated our jurisdiction over labor matters, served January 29, 1988; denied a petition for a cease and desist order, served March 11, 1988; and granted discovery requests for inspections of the sale agreements, subject to a protective order, served March 18, 1988. We also served notice March 7, 1988 of the institution of a court action in Railway Labor Executives' Association v. Interstate Commerce Commission and United States of America, No. 88-1280 (8th Cir. filed February 8, 1988).

and non-traditional work rules, which resulted in overall low budget rail service."

RLEA concludes that WCL will have an adverse impact on rail employees throughout the region. RLEA points out that it has sought voluntary discovery from Soo and WCL, by requests filed September 25, 1987, and that neither carrier responded. It renews its discovery requests. RLEA also renews its requests for oral hearings to develop a record to determine whether WCL has sufficient employees to provide adequate service, to determine whether collective bargaining agreements have been violated, and to determine the extent of the burden placed on employees.

OMV filed objections to the exemption on September 25, 1987, and a petition to revoke the exemption on October 29, 1987. Perfection of service of the petition was not made until December 30, 1987. OMV seeks to prevent Soo from disposing of lines, including WCL's acquired lines in order to assist in enforcing a class action designed to assist black and Hispanic suppliers with the opportunity of doing business with certain rail carriers. The action arises from the Civil Rights Act, 42 U.S.C. 1981 and the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. 801 et seq. (4R Act) and remains in litigation. It argues that the diminution of Soo's railroad assets is contrary to the principle and spirit of the 4R Act. Because the Commission must now consider whether WCL's use of the class exemption is consistent with the Rail Transportation Policy, specifically 49 U.S.C. 10101a(7), it argues that the Commission cannot allow WCL to use the exemption.

3. Replies. Soo filed comments and pleadings on September 25, and 30, 1987; and on February 6, 1988, it filed reply comments to RLEA and OMV's petitions to revoke. It has sup-

ported the transaction as pro-competitive and as the most advantageous realignment possible for the region.

In response to OMV's petition, Soo notes that OMV not only bases its requested relief on a pending lawsuit, but also requests that Soo be prohibited from disposing of any other lines. Soo argues that this latter request demonstrates that OMV's petition is not directed toward any issue that can be resolved concerning the instant acquisition and that the petition should be denied.

In response to RLEA's petition, Soo states that the compensation package it has offered to affected employees provides greater protections than those under New York Dock. Soo has offered these employees options for employment wherever available, and counseling and placement services. Soo submitted a Verified Statement of Darrell E. Ward, its Assistant Vice President Operating Administration, along with a report that shows that 1366 employees were employed on its former Lake State lines as of October 10, 1987 and that, of these, 595 employees remain to be placed or accommodated. Of the 595, the number of employees that were part of its then active work force was 298. Soo states it is continuing to attempt to resolve the status of all adversely affected employees in a mutually satisfactory manner. It notes that WCL now is a competitor and argues that WCL has not been shown to be financially unsound.

WisDot also replied in opposition to RLEA's petition. WisDot does not wish to risk further declines in rail service, which often have serious adverse impacts on rail shippers, or to jeopardize the original sale or sale arrangements. It states that it has purchased 817 miles of abandoned rail lines upon which four shortline carriers now operate and that their start-up was facilitated by the Commission's class exemption

procedures. WisDot maintains that the class exemption procedures and our policies underlying them assist in preserving rail service through private sector initiatives without government financial support and better protects the employment prospects of affected labor. The abandonment process is criticized as "piecemeal, segmented . . . [and] entails inherent service disruption or unprofitable operation. . . ." It argues that there is no legal nexus between the relief sought by RLEA and the provisions of section 10901. It further notes that the Commission authority to impose labor protective conditions is discretionary, citing Railway Labor Executives' Association v. United States, 697 F.2d 285, 286 (10th Cir. 1983). WisDot maintains that RLEA has not demonstrated any exceptional circumstance to warrant imposition of labor protection in this transaction. Finally, while it does not withdraw its previous requests for special procedures to investigate the transaction, it states that "the costs of oral hearings, if not discovery would be substantially out of proportion to any demonstrated injury. . . ." It concludes by stating that requests for oral hearing should not be granted and the exemption should not be revoked.

WCL initially filed various motions, comments, petitions, and replies to petitions on September 9, 17, 25, and 30, 1987, as well as letters of support from shippers, shipper organizations, State, local and city governments, and from financial consultants and banking interests. It also voluntarily provided a copy of the purchase and related agreements.

WCL defends its use of the class exemption process as proper, even for a transaction of this size, and also defends its financial viability and quality of its service. Prior to consummation, WCL studied the lines using a computerized financial model to assist in developing operating expenses and financial

data. Over 110 shippers, representing approximately 75 percent of the traffic base, were consulted concerning WCL's projected operation of the lines. Based on these studies, WCL determined that the present traffic volumes can support a profitable regional railroad. WCL projects a total first year traffic volume of 145,000 carloads, primarily of paper and related products, but also including coal, chemicals, malt, forest products and roofing granules. Its operating experience through January 1988 supports these estimates. Its originally projected operating ratio is 71 percent for 1988 with fixed charge coverage of 2.1. It anticipates that internal funds from operations will support a 5-year $36.6 million capital expenditure program. WCL's initial capitalization was $145 million, which included $15 million in equity and a cash balance of $13 million for working capital.

On February 6, 1988 WCL filed separate replies to the petitions to revoke filed by OMV and RLEA. With regard to OMV, it argues that OMV's demands are based on the outcome of a pending lawsuit to which Soo, not WCL, is a party and that in the event of judgment favoring OMV, Soo will remain to provide relief. WCL argues that any relief for OMV against WCL is only speculative and that OMV should first be required to establish its rights to legal redress against WCL prior to any interference with this transaction. WCL concludes that it, its employees, and its shippers should not be held accountable for the potential outcome of third party litigation.

With regard to RLEA, WCL argues RLEA has not carried its burden of proof. It maintains that RLEA is reiterating arguments that the Commission has rejected in other transactions and not demonstrated any special or unique circumstances to warrant special treatment here. It avers that RLEA

has not demonstrated specific facts supporting its petition to revoke.

WCL argues that all line sales involve debt financing and there is no reason to separate WCL from other acquisitions. Accordingly, WCL avers that the Commission cannot both require information demonstrating financial stability of new carriers and maintain the class exemption process. WCL notes that RLEA's offer to purchase these lines was also based on a leveraged buyout.

WCL points out that statements made in the FRVR acquisition, including statements that RLEA provided as evidence in this proceeding, demonstrate increased rail competition throughout the region. WCL alleges that RLEA is apparently arguing that "the Commission should impose employee protective conditions to increase WCL's costs so that a competitor [FRVR] would not suffer from, and shippers requiring rail service would continue to pay for, inefficient and burdensome labor practices." WCL continues that labor's intransigence was the cause of Soo's decision to sell these lines. It also notes that RLEA has provided no evidence to show that WCL's service has been inadequate and maintains that it is now providing efficient, shipper-responsive service at competitive rates.

WCL avers that RLEA has presented no evidence to show that WCL is dishonest or inefficient or that the wages it pays are unfair, or that its working conditions are unsuitable. WCL maintains that RLEA must first demonstrate by specific proof the validity of these claims before the Commission should act, citing in support Finance Docket No. 30555, Northwestern Pacific Acquiring Corporation and Eureka Southern Railroad Company—Exemption from 49 U.S.C. 10901 and 11301 (not printed) (Northwest Pacific), served January 8, 1988. WCL

compares RLEA's allegations of either dishonesty or inefficiency against the extensive service records of its management team and notes that these individuals are familiar with the area.

DISCUSSION AND CONCLUSIONS

1. Use of the class exemption for the acquisition and operation of WCL as modified here is appropriate. WCL is the largest railroad formed to date under these procedures. We have here studied the use of the class exemption process for the carrier of WCL's size.[11] We have two responses to those parties who opined that our class exemption procedures were never intended to or should not facilitate transactions of this size. First, there are no restrictions on the size of a carrier that can be acquired under 49 CFR 1150, Subpart D. Indeed, we noted that our original Notice of Proposed Rulemaking in Exemption—Acq. & Op., supra,[12] "expanded a proposal . . . seeking exemption for noncarrier acquisitions and operations, where the noncarrier would be a class III carrier after completion of the transaction." Id at 810. We have approved use of the exemption process for other large transactions.[13] Our review in the reopened Ex Parte No. 392 (Sub-No. 1), Class

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[11] The class exemption is designed to eliminate the processing of an application or petition for exemption under 49 U.S.C. 10901 or 10505, respectively, prior to consummation of a transaction. See Exemption—Acq. & Op., supra. A class exemption does not divest the Commission of jurisdiction to scrutinize a transaction and subsequently to revoke the exemption after the fact. Consolidated Rail Corporation—Declaratory Order—Exemption, 1 I.C.C.2d 895 at 899 (1986).

[12] The notice was published at 50 F.R. 34880, August 28, 1985.

[13] See, e.g., Finance Docket No. 31089, Montana Rail Line, Inc.—Exemption Acquisition and Operation—Certain Lines of Burlington Northern Railroad Company (not printed), served July 31, 1987 and May 26, 1988, involving two non-contiguous lines of 544.3 miles and 286.32 miles with bridge rights connecting them.

Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, I.C.C.2d (1988), slip op. served February 29, 1988, reaffirms use of this class exemption for large transactions, albeit with some changes in procedure. Our review reaffirmed that growth of regional carriers has helped to preserve service, jobs and rail investment. The carriers typically provide better service that is tailored to their shippers' needs. Second, and consistent with our later changes in the Ex Parte No. 392 (Sub-No. 1) class exemption rules, we modified the procedure here. We stayed the transaction and took comment. Only after reviewing the comments did we lift the stay. The comments filed and sales agreement voluntarily submitted under seal demonstrate no reason to require further detailed review under section 10901 and indicate numerous beneficial elements. In spite of some limited start-up problems just after consummation, shippers have expressed support for continued WCL operations and opposition to any revocation.

One concern involving transactions of this size is over the amount of information available to potentially affected parties to analyze the proposed transaction. Another related concern is the time available for the parties to comment on the transaction. However, in this transaction, our stay extended the normal 7-day period for consummation to almost a month[14] and we requested and received substantial public comments and information concerning the transaction. As noted, we did not lift the stay until we were satisfied that initial use of the exemption was appropriate and that it would be reasonable to review opposing comments after the fact consistent with 49 U.S.C. 10505. The vast majority of comments were positive, and our procedures still permit revocation if warranted.

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[14] The notice of exemption was filed September 4 to become effective September 11, 1987. The effective date of the exemption was stayed from September 10 to October 11, 1987.

2. Requests for investigations or for discovery are denied. At the time we lifted the stay, several formal and informal requests for hearings, special procedural orders and for discovery had been filed. We advised the parties that we would issue a further decision on the comments, but that requests for hearings or discovery were to be filed in connection with petitions to revoke. Since that time, only OMV and RLEA have filed petitions to revoke.[15] Accordingly, while we have reviewed all the comments filed, we only have need specifically to resolve the more recent requests from RLEA, OMV, and WisDot.

We will not now undertake a further investigation. In declining to institute further detailed proceedings at this time, we first note that WisDot, a principal party now seeking the investigation, supported the transaction (as did the Rail Users Committee, which earlier had sought investigation.)[16] It (and the Rail Users Committee) also supported lifting the stay, while expressing generalized concerns about the class ex-

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[15] WisDOT's request for us to address numerous general legal issues not pertinent to the merits of WCL's purchase of the Soo lines is inappropriate. We have looked at these questions in a general framework in Ex Parte No. 392 (Sub-No. 1), supra. WisDot raised similar issues in that proceeding, and although we thoroughly reviewed all of the comments, we declined to address the State law issues raised by WisDOT. We will note, generally, however, that our exemption here goes to the transaction, not to WCL's future operations, which continue to be subject to Federal regulation. Thus, by this transaction, the State obtains no new authority over WCL. WCL's obligations (if any) for agreements that Soo entered into or that we directed depends on the wording of these matters (e.g., whether they are binding on successors).

[16] We mention this group because it represents the region's affected shippers. However, it is not clear in light of our October 8, 1987 decision directing parties to file petitions to revoke should they continue to seek relief, whether this group still desires the relief it requested before we stayed the transaction and took comment.

emption procedures. They feared additional abandonments throughout the region, which has a history of rail failures, and additional losses to the regional traffic base, which has experienced considerable diversion of traffic to motor carriers, especially over the last few years.

WisDot and Rail Users Committee requested further details concerning the transaction and prospective service from WCL, and also sought restrictions on WCL's service. They sought additional information concerning interchange points, WCL's information as to financial ability, gateways, operational feasibility and restrictive covenants, and for the general operating plan. RLEA has expressed concern over possible anticompetitive restrictions on overhead traffic and competitive access, and has sought detailed information on these issues.

Chairman Gradison stated in Buffalo & Pittsburgh that discovery would be made available in connection with petitions to revoke exemptions consistent with our discovery rules. Our rules provide for discovery which is in support of and related to specific requests for agency actions. Since WisDot and the Rail Users Committee have not asked us to revoke the exemption or to take any particular remedial action regarding the sale, we will deny their request for discovery.

RLEA, as noted above has filed petitions asking that the exemption be revoked in whole or, alternatively in part for the imposition of labor protective conditions. As noted below, we have denied those petitions in this decision. We find that RLEA has not demonstrated that WCL's financial position is precarious and that it will likely fail, the chief basis for its request that the exemption be revoked in full. Nor do we find that it has shown exceptional circumstances so as to justify its request that we exercise our discretion under section 10901 to impose employee protective conditions. RLEA argues that

the discovery it seeks will enable it to support its argument that WCL is not financially viable and that the exemption does not meet the standards of section 10505.

We will permit discovery here consistent with Buffalo & Pittsburgh. As noted there, however, "[r]estrictions or even outright prohibitions against discovery may be justified in individual cases." We note that RLEA has already obtained discovery through its unsuccessful court challenges of Soo's sale of these lines. Moreover, we have disclosed some of the information concerning the transaction in this decision, and the petitioners have also disclosed considerable information regarding the transaction. Under these circumstances, RLEA will, in order to support any motion to compel the discovery of information that the petitioners are not willing to release, have to demonstrate that the information already available is not sufficient to permit it adequately to address the arguments it advances in support of revocation. We have employed and disclosed confidential information submitted by the petitioners in conducting our analysis, discussed herein, as to whether the terms of the sales agreement or the trackage rights agreement or any other aspect of this transaction appear to create a carrier which will be so financially weak as to be unable to provide adequate transportation service to the public. On the basis of that analysis, we have declined to grant RLEA's petition for revocation. If RLEA seeks discovery to file a new petition, it should, in seeking revocation, clearly establish the argument it proposes to make and the information it needs and does not have. The already protracted nature of this proceeding, the fact that significant disclosure has already been made, and the uncertainty that further consideration of requests for revocation will necessarily produce for a sale that has received widespread public support justify our making discovery available only subject to these restrictions.

3. RLEA has not shown cause to revoke the exemption, institute an investigation or modify the exemption to include labor protective conditions. We have recently issued a decision clarifying our policies affecting labor in these acquisition proceedings. FRVR, supra. A primary conclusion was that our preeminent purpose must be to preserve rail transportation. Motor carrier competition in WCL's service area has almost destroyed the rail traffic base. As we noted in FRVR, the paper industry had been a major source of rail traffic in Eastern Wisconsin. The rail share has fallen from 54 percent in 1977 to 20 percent in 1986. Id. at 4. It is our policy to encourage innovative marketing and service to rejuvenate the rail industry, and to promote improved rail service that encourages use of the rail system. There is no better way to protect the interests of rail labor than to assist in preserving viable rail operations.

RLEA's prediction that both WCL and Soo will fail as a result of the transaction is not supported by our analysis of the transaction, which is set out in section 4 below. In adopting our class exemption procedures, we considered arguments that Class I carriers would attempt to divest themselves of marginally profitable lines and that the new carrier would not be financially viable and might not be able to provide adequate service. Exemption—Acq. & Op., supra, at 812. We found that these arguments were not supported by specific evidence and were contrary to our experience. Id.

In rejecting requiring new carriers to demonstrate their financial ability through section 10901 procedures in Exemption—Acq. & Op., we noted that smaller carriers are more dependent on local traffic, have a greater incentive to provide service tailored to the needs of shippers, and may make more efficient use of abandoned or underused rail property. Id. at

813. Contrary to the position advanced by RLEA, "the loss of commonality" between WCL and Soo provides the opportunity to make the rail transportation option more attractive to shippers and communities. Furthermore, the creation of WCL provides the opportunity for more efficient management, which RLEA maintains is necessary. RLEA has demonstrated no good reason to deny WCL entry under our class exemption procedures.

As to imposition of labor protective conditions, we note that, as of February 5, 1988, 477 former Soo employees have been hired by WCL. Another 126 employees expressed interest in WCL employment but did not pursue it. The sales agreement provides that WCL's work force "will consist of not less than 750 persons." No agreement between the principals provides or requires any adverse actions against any employees. WCL's requirement that its new employees surrender their rights with other carriers, including Soo, prior to obtaining employment with WCL is not an unreasonable practice. Neither is WCL's employment of other experienced railroad personnel. These actions do not require our regulatory intervention.

RLEA has made no showing of exceptional or extraordinary circumstances to warrant labor protective conditions. Exemption—Acq. & Op., supra at 815. Exceptional situations are those, for example, "in which there was misuse of Commission's rules or precedent, or where existing contracts specified that line sales were subject to procedural or substantive protection. [footnotes omitted]." FRVR, supra at 3. To modify any exemption, labor must "demonstrate injury that was unique, disproportionate to the gains achieved for the local transport system, and which can be compensated without causing termination of the transaction or substantially undo-

ing the prospective benefits of the Commission's existing policy for other communities and locales." Id. at 3-4. RLEA has not made this demonstration. We have consistently reiterated that job displacement and differing standards of employee protection do not, standing alone, constitute cause for the imposition of labor protective conditions. See, e.g., Finance Docket No. 31094, Grainbelt Corporation—Acquisition and Operation Exemption—Burlington Northern Railroad Company (not printed), served February 2, 1988, Finance Docket No. 31059, Central Michigan Railway Company—Acquisition and Operation—Certain Lines of Grand Truck Western Railroad Company (not printed), served September 4, 1987, aff'd in a decision not printed December 10, 1987, and Northwestern Pacific, supra.

RLEA has argued that the sale, and particularly the sale agreements' requirement that Soo employees resign prior to accepting employment with WCL, violated the employee protective conditions imposed in Milwaukee and in Soo Merger. Whether or not Soo may have in specific instances violated those agreements is no reason to impose new conditions here or to deny WCL use of the class exemption procedures. Any violations are remediable apart from this transaction. This transaction is not a continuation of Soo's purchase of former Milwaukee lines or their subsequent intra-corporate merger. Therefore, any adverse impact on any employee resulting directly from the sale of these lines does not require new employee protective benefits or require Commission adjudication of individual's claims against Soo. Cf. Finance Docket No. 28490 (Sub-No. 1), Atlantic Richfield Company and Anaconda Company—Control—Butte, Anaconda & Pacific Railroad Company and Tooele Valley Railroad Company (not printed), served March 2, 1988.

We have specifically considered the cost of labor protection, which would be very high, if it were imposed on either the WCL or the Soo. (If imposed on the Soo, the burden surely would be transferred, in whole or in part, to WCL. Soo's financial condition would not allow it to absorb the burden—a burden for which there would be little counterbalancing benefit to the public or to affected employees.) There is no assurance that imposition of costly labor protective expenses would not cause the parties to rescind the transfer. Yet, WCL is supported by the vast majority of this area's shippers, and its lower cost operations are necessary to provide effective rail competition in this region. WCL's ability to compete with other rail carriers and other modes is dependent in no small part on lower costs. The large labor expense that RLEA urges could well eliminate that advantage and has not, as discussed above, been justified under our exceptional circumstances test.

4. Revocation of the exemption is not required because of competitive restrictions on WCL. Under 49 U.S.C. 10505(d) "[t]he Commission may revoke an exemption, to the extent it specifies, when it finds application of a provision of this subtitle . . . is necessary to carry out the transportation policy of section 10101a of this title." Our review of the overhead traffic restrictions, Soo's retention of trackage rights, and related competitive concerns does not demonstrate cause to revoke this exemption in whole or in part.[17]

WCL has obtained three trackage rights agreements as part of the sales agreements. Those trackage rights[18] connect

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[17] Under our class exemption procedures, any party may, at any time, request that the exemption be revoked, in whole or in part. However, these potential petitions must be based on reasonable, specific concerns that demonstrate that reconsideration of the exemption is warranted. Simmons v. I.C.C. and U.S.A., 808 F.2d 22 (7th Cir. 1986).

[18] See Appendix B, Part 1.

WCL's main lines to: (1) Superior/Duluth; (2) Minneapolis/St. Paul; and (3) Milwaukee. Without the trackage rights, WCL cannot reach any of these cities or other carriers serving them. The restrictions essentially preclude WCL from competing with Soo on overhead traffic to, from, and through those points. With the exception of the Ladysmith line that is subject to additional limitations discussed immediately below, the restrictions apply only to overhead traffic that WCL could otherwise only obtain through use of the trackage rights to those interchange points. The restrictions do not apply on any traffic that originates or terminates at any points on WCL's lines. They also do not preclude direct service to consignors or consignees on the trackage rights lines in movements that originate or terminate on WCL's directly owned lines, although local service over the trackage rights lines is precluded. Additionally, the restrictions do not apply to overhead traffic that WCL could interchange with other carriers at other points, particularly the line-haul carriers serving Chicago and Sault Ste. Marie, the Chicago and North Western at various points, and with the Green Bay and Western with its direct connections to Minneapolis/St. Paul. For points in Ontario west of Sudbury, in Upper Michigan or in Wisconsin north of Soo's main line between LaCrosse and Milwaukee, WCL is not restricted as to overhead traffic. The restrictions are designed to preserve Soo's competitive status quo ante on overhead traffic.

The overhead traffic condition applicable to movements through Duluth/Superior is not limited to WCL's use of the Ladysmith-Superior trackage rights but applies to all possible competing movements that WCL might arrange with other carriers serving the Duluth/Superior area. Under the arrangement, Soo may terminate the trackage rights and/or require

WCL to purchase the line. Accordingly, while Soo may force WCL to purchase the line under established price guidelines, neither the trackage rights agreement nor the sale agreement foreclose WCL's participation in this overhead traffic with other carriers. If WCL wants to compete for this traffic, it may do so subject to the possible forced purchase of the Ladysmith line. This restriction is neither financially fatal to WCL nor anticompetitive. It does not constitute good cause to condition or revoke the transaction.

The trackage rights restrictions should have little impact on WCL's financial health, which is predicated on regional service. WCL's pre-consummation studies took these restrictions into consideration and still found that the regional operation could be profitable. Under the terms of the restrictions, no shipper on WCL's lines will be affected. The few shippers outside WCL's service area that might desire routing over WCL's lines will not suffer any substantial adverse effects as a result of this transaction.

The only ascertainable effect on overhead traffic is on that traffic that could be routed through Sault Ste. Marie to or from points in Canada east of Sudbury. For other Canadian points through the Twin Cities or Superior/Duluth gateways, WCL could not provide effective competition to Soo's remaining routes and service. The Soo's remaining main line routes connect Superior/Duluth to Chicago via Minneapolis/St. Paul and Lacrosse, WI. These routes carried most of the pre-sale traffic subject to these restrictions.

We have recently specifically considered these movements through Sault Ste. Marie in Finance Docket No. 30703, Soo Line Railroad Company—Joint Use of Lines—Chesapeake and Ohio Railway Company (not printed), served September 10, 1986. In that proceeding, we authorized a trackage rights ex-

emption for Soo operations over the Chesapeake & Ohio Railroad Company (C&O) between Chicago and Detroit, MI where Soo interlines with CP. Originally, Soo introduced this new route as a relocation of Soo overhead operations pursuant to our class exemption at 49 CFR 1180.4(g).[19] Operations from Chicago to Detroit began on August 7, 1985. Soo demonstrated the need for these operations because of "limitations of the international bridge at Sault Ste. Marie . . . [indicating] that the overall age and operational limitations of this facility prevent the timely and efficient handling of CP traffic interchanged with the Soo at Sault Ste. Marie." Id. at 1.[20]

Soo's change in routing for this traffic generated objections by CNW and Grand Trunk Corporation that "the operational advantages of routing via the Soo's service over the C&O's Detroit-Chicago line, compared to routing via Sault Ste. Marie, are enhanced to an even greater extent . . ." for CP originating and terminating traffic. Id. at 3.

Prior to the Soo operation via Detroit, CP interchanged more traffic destined or originating west of Chicago at Detroit (42,220 carloads in 1984) than through Sault Ste. Marie (27,651 in 1984). Id. at 4. Soo's new rate levels for the Chicago/Detroit gateways are lower than through Sault Ste. Marie. We conclude that "the routing resulting from the Soo/C&O agreement enables Soo to provide a more competitive and efficient service than that under Soo's prior interchange operations with CP via the Sault Ste. Marie gateway. . . ." Id. These

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[19] For reasons not pertinent to this proceeding, that relocation exemption was revoked and application of our class exemption for trackage rights under 49 CFR 1180.2(d)(7) was found applicable.

[20] In this regard, we note that the Sault Ste. Marie bridge is subject to a weight restriction of not more than 178,000 lbs., as compared with the national line-haul average weight restriction of 273,000 lbs. See Railway Line Clearances, International Thomson Press, New York, New York (July 1987).

operational advantages and cost savings result even though the Chicago gateway is more circuitous than the Sault Ste. Marie gateway.[21] The elimination of the interline route to points in Canada east of Sudbury through Sault Ste. Marie will have little, if any, significant effect on shippers. Soo will continue to handle this traffic through the Twin Cities gateway via Chicago. The restrictions do not lessen effective or efficient competitive options for these shippers.

As for the restrictions at Milwaukee, we note that service at Milwaukee will be enhanced for regional movements by the introduction of the new carrier, except for these overhead movements and traffic moving within the Milwaukee trackage rights area. For these movements, Soo will continue to provide service and shippers will not be subjected to a reduction in service or competitive options. By contrast, Soo's rights to provide unit coal train service to Wisconsin Public Service Corporation at Weston, WI over trackage rights between New Lisbon and Weston, WI, is non-exclusive, potentially allowing WCL to provide service. WCL will also benefit from the income that Soo's use of the trackage rights generates. Finally, Soo's trackage rights between Duplainville, WI and Forest Park, IL do not have on their face any anticompetitive impact and the related joint operation of lines between Forest Park and Chicago, IL is pro-competitive.

Overall, the restrictions on WCL merely emphasize the regional orientation of the new carrier. Contrary to the positions advanced by some commentators, and despite its substantial trackage, WCL was designed and planned to serve local economies and provide feeder service. As to regional traffic, WCL's superior competitive service and rates compared to that previously provided by Soo have already been demonstrated.

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[21] The route between St. Paul and Montreal via Sault St. Marie gateway is 1,111.4 miles compared with 1,307 miles through Chicago.

The operating arrangements here do not reduce competition. The most that can be said is that, in some circumstances, they replace one carrier with another. In other places, competition will be increased. While it is understandable that shippers would desire in WCL the greatest degree of competition possible, it is not reasonable to expect that Soo would structure a sale such as this in a way that would jeopardize its long-haul traffic.

5. OMV's requests are denied. OMV has requested that we preclude Soo from selling any of its lines. This request is based on certain alleged third party beneficiary rights. However, as WCL notes, OMV's dispute is with the Soo, not WCL's purchase here. This transaction provided new financial resources to the Soo (the sale price). Soo's ability to pay any judgment OMV may obtain is not adversely affected and may actually be enhanced. Even if we had authority to impose an across the board prohibition on Soo from disposing of any lines (which we question), OMV has not justified such a broad action.

6. Other matters. We have also reviewed this transaction with regard to potentially affected railroad structures on the involved property that are either listed or eligible for listing in the National Register of Historic Places. In order to gather sufficient information to evaluate the eligibility of properties for the National Register, the Commission will undertake a section 106 National Historic Preservation Act review process. Accordingly, WCL shall refrain, pending completion of that process, from taking any action that may jeopardize the historic integrity of sites and structures on the acquired properties that are 50 years old and older.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered.

1. The outstanding petitions are denied, except to the extent further discovery is permitted.

2. The Commission will undertake a section 106 National Historic Preservation Act process in this matter. Pending completion thereof, WCL shall refrain from taking any action that may jeopardize the historic integrity of sites and structures 50 years old and older.

3. This decision is effective on the date served.

CONCUR:

COMMISSIONER SIMMONS, concurring:

After a thorough examination of the issues raised and evidence presented, coupled with the endorsement of shippers, local and State officials, I agree that the transaction should not be revoked. Initially, shippers and governmental agencies believed that without sufficient information available, without an opportunity for Commission analysis, their interests and the national rail policy were not being served. Instead of generalized conjecture and unfounded premises the majority has been so fond of espousing in similar cases, we had before us a more detailed record on the nature of this transaction on which to make an informed decision.

The confusion and concern surrounding the initial filing of this transaction, demonstrates the drawbacks of including within the class exemption large transactions involving potential Class I and II carriers. In order to fulfill our statutory responsibility, I continue to believe that transactions which would create Class I and II railroads should be excluded from the class exemption. Furthermore, I would require that the petitions be subject to notice and comment for a prescribed period of time. This proceeding would encourage the parties to the agreements and other interested parties to cooperate

and share vital information. Use of the class exemption in these large transactions has only inspired greater concern because of a lack of information provided in the notices of exemption to the Commission and the public. Indeed, the scant information contained in the notice requirements has proven to be inadequate to support the necessary findings under section 10505.

Additionally, the sheer scope of these transactions—in terms of mileage, markets, potential revenues, and employee impact—should compel the Commission to carefully consider the viability of these new carriers. This assessment is critical once the large carrier has left the picture because any financial difficulties encountered by the new operators could result in the loss of rail service to substantial shippers and communities. While we should take notice that investors may believe in the new operator's ability to manage from a financial point of view, the Commission's inquiries into the financial health of a new carrier are different. We are concerned with complete loss of service whereas investors have the option of liquidating the property.[1] Those investors' interests are protected. Our obligation is to protect the interests of shippers, communities and employees.

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[1] In its report dated June 28, 1988, the Trustee of Chicago, Missouri & Western Railway, stated on page 5, that CM&W was destined for bankruptcy on the day it was born. He cites two reasons; first, the price was too high and, second, CM&W entered into numerous operating agreements with Illinois Central which decreased traffic on CM&W's lines. He stated on page 6 that the primary reason this happened was that the ICC did not conduct a "full-dressed examination of this purchase and sale transaction." The Trustee went on to state: "Rather, an exemption procedure was used whereby the ICC did not look at the transaction and whether the surviving carrier would be viable. Thus at the time of this sale, no public agency had the opportunity to examine whether the public interest was served by this sale."

As I have expressed in the past, I believe this Commission must examine and reject those agreements which impose conditions and limitations on buyers by the selling railroads that restrict the buyers' ability to realistically compete. Clearly, such provisions are anticompetitive and hamper the buyer's financial viability. Severe operational restrictions contradict the essential purpose of the class exemption and the Staggers Act; that is, to foster financially sound carriers with absolute freedom to compete for shippers.[2]

Upon review, I believe the conditions negotiated in the trackage rights under agreements here are apparently consistent with similar arrangements within the industry, and are not of the egregious nature found in the Montana Rail Line agreement. Provisions contained in the trackage rights agreements are designed to connect WCL to cities and carriers it could not otherwise reach. The provisions in those agreements which preclude WCL from competing with Soo on overhead traffic to, from, and through those points are similar to other conditions found in trackage rights agreements in the industry. Under the agreements, WCL can serve markets that originate or terminate at any point on WCL's lines. It can provide direct service to consignors and consignees on the trackage rights lines in movements that originate or terminate on WCL's directly owned lines. I also note that the restrictions do not apply to overhead traffic that WCL could interchange with other railroads at other points, including carriers serving the important markets of Chicago, Sault Ste. Marie, Minneapolis, St. Paul, and Milwaukee.

While Soo Line retained trackage rights on WCL's line between New Lisbon and Weston, WI, in order to provide ser-

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[2] See my separate expression in Finance Docket No. 31089, Montana Rail Link, Inc., Exemption Acquisition and Operation--Certain Trackage Rights of the Burlington Northern Railroad Company, served May 27, 1988 (not printed).

vice to Wisconsin Public Service Corporation at Weston, the agreement does not contain provisions which preclude WCL from competing to serve the utility.

APPENDIX: APPENDIX A

PART 1

ACTIVE RAIL LINES PURCHASED

Location	Route Miles
Withrow, MN—Forest Park, IL	421.2
Owen, WI—Ladysmith, WI	44.7
Withrow, MN—Sault Ste. Marie, MI	469.6
Chippewa Falls, WI—Eau Claire, WI	11.2
Wisconsin Rapids, WI—Vesper, WI	8.2
Spencer, WI—Ashland, WI	145.8
New Lisbon, WI—Tomahawk, WI	133.1
Argonne, WI—Neenah, WI	121.1
White Pine, MI—Marengo, WI	77.7
Trout Lake, MI—Baraga, MI	192.4
Green Bay, WI—North Milwaukee, WI	103.8
Manitowoc, WI—Neenah, WI	44.2
Cameron, WI—Rice Lake, WI	6.7
Negaunee, MI—Palmer, MI	4.8
Vesper, WI—Nekoosa, WI	16.5

PART 2

LINES APPROVED FOR ABANDONMENT SUBJECT TO SALES AGREEMENT

Location	Route Miles
Dresser-St. Croix Falls, WI—Danbury, WI	50.6
Mellen, WI—Bessemer, WI	33.3
Marshfield, WI—Vesper, WI	16.2
Bergland, MI—Nestoria, MI	68.8
Trout Lake, MI—St. Ignace, MI	27.5
Baraga, MI—Arnheim, MI	10.3

APPENDIX B

PART 1

TRACKAGE RIGHTS AGREEMENTS OVER SOO LINE RAILROAD COMPANY LINES

Agreement No. 1, Twin Cities Trackage Rights:

Location	Route Miles
Withrow, MN—Shoreham, MN	21.3
Central Ave., MN—Crystal, MN	5.4
Cardigan Jct., MN—Soo Line Jct., MN	5.3
St. Paul, MN—Merriam Park, MN	11.1

Agreement No. 2, Ladysmith Trackage Rights:

Location	Route Miles
Ladysmith, WI—Superior, WI	105.1

Agreement No. 3, Milwaukee Trackage Rights:

Location	Route Miles
Duplainville, WI—Milwaukee, WI	16.5
North Milwaukee, WI—Grand Ave., WI	7.0
Cutoff, WI—Meskego Yard, WI	1.9

PART 2

ASSIGNED TRACKAGE RIGHTS AGREEMENTS OVER THIRD PARTY CARRIERS

Agreement No. 1 over Marinette, Tomahawk & Western Railroad Company:

Location	Route Miles
Bradley, WI—Tomahawk, WI	5.4

Agreement No. 2 over Green Bay & Western Railroad Company:

Location	Route Miles
Black Creek, WI—Green Bay, WI	22.3

APPENDIX B

INTERSTATE COMMERCE COMMISSION DECISION

Finance Docket No. 31102

WISCONSIN CENTRAL LTD.—EXEMPTION ACQUISITION AND OPERATION—CERTAIN LINES OF SOO LINE RAILROAD COMPANY

Decided: October 7, 1987

By decision served September 11, 1987, we stayed the effective date of an exemption that would allow Wisconsin Central Ltd. (WCL) to acquire and operate certain properties (approximately 200 miles) of the Soo Line Railroad Company (Soo). We requested comments concerning the transaction. By decision served September 22, 1987, we denied petitions for reconsideration of the stay so that we would have time to consider the comments. We have reviewed the comments filed and the replies of WCL and Soo and are now vacating the stay. Our study will continue however, and we will issue a further decision addressing the comments.

BACKGROUND

Under our class exemption procedures,[1] exempt status is automatically granted at the end of a 7-day period at which time the transaction could be consummated. Due to the unprecedented scope of this sale, we stayed the transaction until October 25, 1987 in order to receive comments from the public on the appropriateness of considering the sale under our class exemption procedures. Interested parties were given until

[1] The Commission exempted non-carrier acquisition of rail lines from the requirements of 49 U.S.C. 10901 in *Class Exemption for the Acquisition and Operation of Rail lines under 49 U.S.C. 10901*, 1 I.C.C. 810 (1985), *aff'd sub nom. Illinois v. ICC*, 817 F.2d 145 (D.C. Cir., 1987) (*Class Exemption*).

September 25, 1987 to comment and applicant was given until October 2, 1987 to reply.

We received comments in support of lifting the stay and allowing the transaction to proceed from the following parties: The Wisconsin/Upper Michigan Rail Users Committee, *et al* (Rail Users Committee), an ad hoc coalition of shippers, in comments filed September 11, 1987; International Minerals & Chemical Corporation and Michigan-Wisconsin Transportation Company, in comments filed September 24, 1987; Iowa Department of Transportation, Minnesota Department of Transportation, Wisconsin Department of Transportation,[2] Soo, and WCL, in comments filed September 25, 1987. Opposition to the transaction was stated by the Organization of Minority Vendors (OMV), and by the Railway Labor Executives' Association (RLEA), filed September 25, 1987. We also note the late-filed comments of the United Transportation Union, filed September 30, 1987. Also on September 30, 1987, WCL and Soo filed replies.

Additionally, numerous shippers, shipper and business organizations, State, local, and Federal representatives, state and local government agencies, civic organizations, other transportation companies, labor unions, railroad employees, and concerned individuals filed telegrams or letters. Most of this correspondence supports the transaction and the vacating of the stay.

DISCUSSION AND CONCLUSIONS

Our review of the comments filed in this proceeding convinces us that continuation of the stay is not in the public interest. The parties have provided us with considerable additional information since we imposed our stay. Our duty to

[2] WisDOT also filed comments supporting vacating the stay on September 10, 1987.

ascertain and protect the public interest by informing ourselves more fully concerning this transaction has been met. A review of the details of the proposed transaction and the widespread support of the transaction demonstrate good cause to remove the stay and to allow the exemption to take effect.

Continuation of the stay could cause unnecessary harm to the transaction. WCL has argued strongly that a prolonged stay could preclude consummation. WCL states that its pre-consummation financial arrangements did not anticipate a prolonged Commission inquiry because of the availability of the class exemption procedures. WCL states that, if the Commission had stayed this procedure previously, it would have structured its start-up operations differently.

WCL assembled its finances, offices, equipment, staff and work force to institute service at the end of the 7-day notice period. It notes that these expenses are being supported by the proponents of WCL and estimates that $1 million in additional costs have been incurred from September 10, 1987 when the stay went into effect to September 30, 1987. Some individuals are without income during this period. It also notes that its insurance commitments may expire on October 11, 1987, and indicates substantial difficulties should the transaction not be consummated prior to that date.

Concern has also been expressed over diversion of WCL's traffic base during this period. Rail Users Committee, as well as State and local parties have expressed fear that, if financial commitments are undermined and the sale is lost, a series of abandonments may occur and this regional rail system will be permanently lost.

Under these circumstances we will lift the stay, but continue to review the transaction.

RLEA, OMV, the Rail Users Committee, and WisDOT have requested further hearings into the transaction. The concerns expressed in those petitions may be adequately addressed in the context of petitions to revoke the exemption, the usual procedure for resolving issues raised in class exemption proceedings. These parties may pursue this course should they believe it appropriate.[3] Petitions to revoke may incorporate by reference pleadings already filed making procedural requests.[4]

For the reasons stated above, we find that the stay imposed in this proceeding should be vacated. Our action will be made effective three days from the date of service of this decision.

Finally, it should be noted that the use of the exemption process for approval of a transaction of this scope has raised some concern. We continue to believe that the policy underlying the exemption procedure established in Ex Parte No. 392 (Sub-No. 1) for the sales of lines to non-railroads remains valid and on the whole has been extremely beneficial to the shipping public. Nevertheless, it is true that the larger transactions, however one might define them, present issues which are at least somewhat less appropriately dealt with by the exemption process. More interests are more greatly affected, and the efficacy and fairness of revoking the exemption in a later proceeding becomes more questionable. Those difficulties are clearly raised with this transaction.

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[3] This class exemption merely removes processing the application under the formal procedural requirements of 49 U.S.C. 10901 to streamline our procedures. *See Class Exemption, supra* at (9). A class exemption does not divest the Commission of jurisdiction to scrutinize a transaction. *Consolidated Rail Corporation—Declaratory Order—Exemption*, 1 I.C.C.2d 895 at 899 (1986).

[4] *E.g.*, RLEA's request for oral hearing and petition to commence discovery.

The Commission has recently requested comments in Ex Parte No. 392 (Sub-No. 1) with a view to changing our procedures in a manner which will preserve the benefits of a shortened approval time frame while affording procedural fairness in those instances where real problems arise. The Commission, arguably, would or should make an exception from its regular order in this instance. However, if a change in the procedures is to be made, it should be made as a general matter of policy in Ex Parte No. 392 (Sub-No. 1) rather than on an *ad hoc* basis, especially when there is very little evidence of record addressing the issues of when an alternative procedure ought to be invoked and what that procedure should be. In this particular case, two other factors weigh against deviating from our current procedure. The parties to this transaction obviously relied, and were entitled to rely, on the Commission's stated policy in fashioning the transaction and their approach to obtaining regulatory approval. Secondly, while a proceeding to revoke the exemption in whole or in part may not be the best mechanism to correct any public interest deficiencies in the transaction, the Commission can and will take such action as may be necessary to protect that interest.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The stay is vacated.

2. Notice of this decision will be published in the *Federal Register* on October 14, 1987.

3. This decision is effective three days from the date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Vice

Chairman Lamboley and Commissioner Simmons dissented with a separate expression which will be served at a later date.

Noreta R. McGee
Secretary

(SEAL)